

## Lost in Translation: Distinguishing between French and Anglo-American Natural Rights in Literary Property, and How Dastar Proves that the Difference Still Matters

Benjamin Davidson

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# Lost in Translation: Distinguishing Between French and Anglo-American Natural Rights in Literary Property, and How *Dastar* Proves that the Difference Still Matters

Benjamin Davidson†

<b>Introduction</b> .....	584
I. "Confounded in the Dust, Adore That Power"; Or, the Foundations of British Copyright Law .....	589
A. The Stationers' Copyright and a Property Right in Copies.....	589
B. The Development of the Author's Property Right .....	591
C. <i>Millar</i> and <i>Donaldson</i> Interpret the Statute of Anne .....	594
1. <i>The Statute of Anne</i> .....	594
2. <i>Millar v. Taylor</i> .....	596
3. <i>Donaldson v. Becket</i> .....	600
II. "In Pride of Youth, and Felt Through Nature's Depth"; Or, United States Copyright Comes of Age.....	601
A. The Constitution .....	601
B. <i>Wheaton</i> and Beyond.....	603
III. "Who Can Number up His Labours?" Or, the Dual Evolution of French Copyright.....	604
A. Authors' Rights in Late Medieval France .....	604
B. The Legacy of the French Revolution .....	608
IV. "But Hark! Methinks I Hear a Warning Voice," Or, the Encroachment on American Copyright Law .....	611
A. <i>Berne</i> and Moral Rights Legislation .....	611
B. <i>Dastar</i> and the Elimination of "Mutant Copyright" .....	614
<b>Conclusion</b> .....	620

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† Candidate for J.D., Specialization in International Studies, Cornell Law School, 2005; Bachelor of Arts, University of California, Los Angeles, 1996. I would like to extend my deepest thanks to the ILJ Editorial Board for its invaluable work regarding this Note, and in particular Harrison Denman. I would also like to thank Professors Mitchel de S.-O.-l'E. Lasser and Madhavi Sunder for their inspiration in directing me toward this Note topic, and to Estelle McKee for her constant support and guidance. This Note is dedicated to my grandmother, Bessie Green.

## Introduction

By Nature's swift and secret-working hand,  
The garden glows, and fills the liberal air  
. . . while the promised fruit  
Lies yet a little embryo, unperceived.

—James Thomson<sup>1</sup>

Nearly three centuries ago, when the House of Commons ratified the Statute of Anne,<sup>2</sup> Britain's first copyright statute,<sup>3</sup> it drew a sharp line that uncoupled the rights of owners of literary property<sup>4</sup> from those of owners of more traditional possessions, such as land. Specifically, the drafters of the Statute of Anne sought to displace traditional copyright principles, based on common law, with legislative enactments that alone would define the scope of literary property rights.<sup>5</sup> The Statute vested copyright holders with a maximum twenty-eight year monopoly, during which time they could defend their copyrights in court against infringers and pirate publishers.<sup>6</sup> But there was a catch: When the monopoly expired, with it vanished any potential claims against infringers.<sup>7</sup> The formerly copyrighted work passed into the public domain, where it would forever remain freely available for public use, a development designed to further "the Encouragement of Learning," which not coincidentally was the Statute's title.<sup>8</sup> As interpreted in the seminal case of *Donaldson v. Becket*,<sup>9</sup> the Statute of Anne placed a higher value in the public's interest in unfettered access to published works than in authors' and publishers' economic interest in perpetual, exclusive copyright privileges.<sup>10</sup>

1. JAMES THOMSON, *Spring*, in 1 THE POETICAL WORKS OF JAMES THOMSON 3, 6 (London, Bell and Daldy Fleet Street 1866).

2. An Act for the Encouragement of Learning, 8 Ann., c. 19 (1710) (Eng.) [hereinafter Statute of Anne], reprinted in HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710, 109-17 (1956).

3. Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 402 (2004).

4. This Note focuses on authors and the rights they have in relation to their literary creations because the law of copyright historically has been linked to the written word. However, moral rights cut across a number of creative disciplines. See Dan Rosen, *Artists' Moral Rights: A European Evolution, an American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 170-75 (1983). In fact, Michelangelo is popularly believed to be among the first to have invoked the full range of moral rights. *Id.* When necessary, examples drawn from the experiences of other artists, such as painting and sculpting, will be used to illustrate a particular point.

5. See Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 336-37 (2000).

6. Statute of Anne, 8 Ann., c. 19, paras. 3 & 14 (1710) (Eng.), reprinted in RANSOM, *supra* note 2, at 110 & 117.

7. See *id.*

8. Dallan, *supra* note 3, at 367-68, 403.

9. *Donaldson v. Becket*, 1 Eng. Rep. 837 (1774).

10. *Id.* at 845 (stating that the "notion of a perpetual privilege and monopoly . . . would be fatal to the interest of letters"), quoted in Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2442-43 n.36.

The Framers of the U.S. Constitution retained this value judgment, weaving into Article I their conviction that "The Congress shall have power. . . To promote the Progress of Science. . . by securing for *limited Times* to Authors. . . the exclusive Right to. . . Writings" (the "Copyright Clause").<sup>11</sup> Following its constitutional mandate, Congress passed the Copyright Act of 1790, which paralleled the Statute of Anne in granting authors of maps, books and charts up to a twenty-eight year monopoly.<sup>12</sup> The Act fulfilled the Constitution's directive to promote learning by empowering the public domain<sup>13</sup> to exploit noncopyrighted works for its own ends.

Meanwhile, American courts and legislators continued to deny authors' claims that they possessed unalienable natural rights to their works that reached beyond the scope of the Copyright Act. In *Wheaton v. Peters*,<sup>14</sup> the Supreme Court definitively repudiated the existence of an independent strain of natural-law based copyright, and instead asserted that copyright claims "must be examined [only] in reference to. . . statutes."<sup>15</sup> Several decades later, a report appended to the Copyright Act of 1909 explicitly stated that the "enactment of copyright legislation. . . is not based upon any natural right that the author has in his writing."<sup>16</sup> Even during the past century, which has seen creators benefit from dramatic extensions in the term of statutory monopolies,<sup>17</sup> neither Congress nor the courts have attempted to reward creators through the establishment of a natural law copyright regime.

By contrast, French authors have long been accustomed to defending not only their positive law economic rights, but an entirely separate category of "moral rights" (or *droit moral*) as well. Also referred to as "author's rights" (or *droit d'auteur*), moral rights are grounded in the author's personhood, as though copyright were a fundamental human right<sup>18</sup> or a "per-

11. U.S. CONST. art. I, § 8, cl. 8. (emphasis added).

12. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1834), reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906, at 32 (Thorvald Solberg ed. 1906).

13. Professor Gordon defines the public domain in the following way:

In American law, the public domain is largely filled with creations whose period of protection has expired, works which have been abandoned, or works for which no protection existed *ab initio*. Similarly, if there are works which, under Lockean principles, would have only limited duration or would not be capable of being owned, they would be part of the common.

Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1559 (1993).

14. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

15. *Id.* at 662.

16. 35 Stat. 1075 (1909) (repealed 1976); see also Alain Strowel, *Droit d'auteur and Copyright: Between History and Nature*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 245 (1994) (quoting the Copyright Act of 1909).

17. See 17 U.S.C. § 302(c) (2000) (extending the statutory copyright term in cases where the author is undetermined to life of the author plus seventy years after publication, or, if the life of the author is undetermined, ninety-five years from publication or 120 years from creation, whichever is shorter).

18. Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 934 (2002).

sonal civil right[ ].”<sup>19</sup> In France, statutes protecting authors’ monopolies exist alongside—and do not preempt—a discrete system of laws that protects their reputation.<sup>20</sup> Although moral rights were not codified into French civil law until the twentieth century, they gained acceptance long before being memorialized in statutory form. From at least the French Revolution, and arguably dating back to the sixteenth century, the French state has consistently protected authors’ reputations, even to the detriment of the public interest.<sup>21</sup>

French law now recognizes four major categories of moral rights. Authors have the right to “divulge,” meaning they can control how their works are communicated to the public;<sup>22</sup> the right to “retract,” such that they can recall all copies of a work that “no longer reflects its creator’s beliefs and personality”;<sup>23</sup> the right of “attribution,” which prohibits others from claiming the author’s work as their own;<sup>24</sup> and the right of “integrity,” which bars subsequent owners from changing the content or appearance of an author’s work.<sup>25</sup> These rights, considered natural rights under French law, are theoretically permanent<sup>26</sup>—the author or her heirs can invoke them whether or not they retain actual ownership of the work. Thus, while France recognizes that creators lose possession of writings that enters the public domain, “the Moral Rights doctrine provides the author with a bundle of vested rights that nonetheless remain.”<sup>27</sup>

The United States’ opposition to moral rights legislation was a major reason that for over a century it refused to sign on to the 1886 Berne Convention for the Protection of Literary and Artistic Works<sup>28</sup> (“Berne Conven-

19. Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 42 (1998).

20. See Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1209–10 (2002) (explaining the philosophical underpinnings of the “dualist” approach that recognizes both economic and moral rights). The words “prejudicial to the author’s honor or reputation” are also found in the Canadian Copyright Act, R.S.C., ch. C-42 (1985) (Can.), and the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971) [hereinafter *Berne Convention*], reprinted in SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 929–55 (1987).

21. See generally CYNTHIA J. BROWN, *POETS, PATRONS, AND PRINTERS: CRISIS OF AUTHORITY IN LATE MEDIEVAL FRANCE* 2–59 (1995) (surveying the legal and extra-legal actions of several sixteenth-century French authors to protect their reputations); Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT’L & COMP. L. REV. 423, 437–53 (1999) (discussing the history of copyright laws in France and the development of authors’ moral rights).

22. Thierry Joffrain, Comment, *Deriving a (Moral) Right for Creators*, 36 TEX. INT’L L.J. 735, 762–67 (2001).

23. *Id.* at 767–68.

24. *Id.* at 768–70.

25. *Id.* at 771–76.

26. While moral rights advocates believe that in theory moral rights should exist in perpetuity, as a practical matter they are subject to the same statutory limits as their economic counterparts. See Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1300 (2003).

27. Suhl, *supra* note 20, at 1205.

28. Berne Convention, *supra* note 20.

tion" or "Berne"), considered "the premier multilateral copyright agreement."<sup>29</sup> Initially the United States did not ratify the Berne Convention because it feared liability for its nonenforcement of widespread infringement of European copyrights;<sup>30</sup> but its stance hardened ideologically when the Rome Convention of 1928 passed article 6bis, which incorporated the moral rights of attribution and integrity into the Berne Convention.<sup>31</sup> In 1988 however, the United States finally acceded to Berne<sup>32</sup> when it recognized that the piecemeal bilateral agreements it had established to that point were grossly insufficient to protect the piracy of its own cultural exports.<sup>33</sup> Nevertheless, despite the United States' status as a signatory nation, it has balked at implementing a moral rights regime in accordance with article 6bis, and in fact argued that current laws provided sufficient protection of personality interests.<sup>34</sup>

Long before the Berne treaty, and especially in light of its passage, many commentators have clamored for the wholesale incorporation of moral rights laws to enable the United States to "catch up" to its European brethren.<sup>35</sup> This implies that not only would such a transplant be substantively beneficial, but also that it would be feasible, in that moral rights legislation would not unravel two centuries of congressional copyright statutes and common law precedent. To defuse this concern, some contend that the economic rights/moral rights divide is overblown, noting that "the long experience of many nations indicates that recognizing moral rights and restricting their alienability is not obviously lethal to such goals as

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29. Dallon, *supra* note 3, at 440 n.471 (quoting ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 12.1, at 273 (2003)).

30. Jane C. Ginsburg et al., Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long*, 18 CARDOZO ARTS & ENT. L.J. 651, 696 (2000) ("One reason that we did not have particularly strong copyright laws until relatively late in the game was that we thought the balance of economics favored piracy over protection."); Monica E. Antezana, Note, *The European Union Internet Copyright Directive as Even More Than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT'L & COMP. L. REV. 415, 423-24 (2003) (noting that in fact "during much of the nineteenth century, the United States was infamous as a 'pirate' nation—the best-selling literary works in America were unapproved, 'piratical' copies of British works," quoting CRAIG JOYCE ET AL., *COPYRIGHT LAW* 35 (5th ed. 2001)).

31. Berne Convention, *supra* note 20, art. 6bis

32. Antezana, *supra* note 30, at 424.

33. *Id.* at 423, 426.

34. *Id.* at 426-27.

35. See, e.g., Rosen, *supra* note 4, at 181, 188 (noting that while American expansion westward "allowed little opportunity for artistic development and appreciation," America today "is attuned to the artists' ethic and emphasis on individuality . . . [so that] the social climate . . . is ripe for the moral rights doctrine to arise"); Jimmy A. Frazier, Comment, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 343-46 (1995) (stating that the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5130 (1990) (codified at 17 U.S.C. at 106A) [hereinafter VARA], which grants limited moral rights to artists, "marks a significant turning point in American copyright law" even though it does not extend to authors); William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 404 (2000) (arguing that American "laws are substantially below world norms," in spite of the U.S.'s signing of the Berne Treaty).

equitable remuneration or public dissemination.”<sup>36</sup> Others are cautiously optimistic that the 1990 passage of the Visual Artists Rights Act (“VARA”) will eventually erode Americans’ misplaced distrust of moral rights,<sup>37</sup> and argue that more mainstream causes of action, such as misappropriation and unfair competition, have long protected authors’ interests and therefore demonstrate that moral rights are entirely “compatible with American [copyright] law.”<sup>38</sup> Finally, there are those contending that, regardless of any threshold difficulties in implementation, moral rights expansion is critical because the United States cannot preserve its “vast cultural legacy” unless it “provide[s] more full moral rights protection to meet society’s changing needs.”<sup>39</sup>

However, the cool reception with which courts have greeted litigants seeking relief under VARA and its state law analogues, coupled with the Supreme Court’s unanimous rebuff in *Dastar Corp. v. Twentieth Century Fox Film Corp.*<sup>40</sup> of what it considered a quasi-moral rights claim, demonstrate that these hypotheses are untenable. It is true that the assimilation of moral rights has lagged in part simply because they are unpopular,<sup>41</sup> and that legislative efforts to give effect to the Berne Convention have been halfhearted at best.<sup>42</sup> Nevertheless, this Note argues that the failure of authors’ rights to gain a foothold in the United States is largely a consequence of their inherent nature as codifications of idiosyncratic French conceptions of natural rights, which are at loggerheads with the Anglo-American missive to *displace* natural law copyright in favor of an artificially calibrated copyright regime that favors a free public domain over creators’ latent reputation interests.

Part I examines the foundations of British copyright law, with special emphasis on key developments and cases from the introduction of the printing press to the eighteenth century. Part II traces the evolution of French copyright, focusing on early sixteenth-century court decisions and developments in the century following the French Revolution. Part III surveys the elimination of natural law in American copyright from the colonial years to the present day. Part IV discusses the implications of the Berne Convention and chronicles the failure of moral rights to penetrate U.S. copyright jurisprudence, as exemplified by the Supreme Court’s recent ruling in *Dastar Corp. v. Twentieth Century Fox Film Corp.*<sup>43</sup>

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36. Joffrain, *supra* note 22, at 777.

37. VARA, 17 U.S.C. § 106A (granting creators of certain visual artworks the rights of attribution and integrity); Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 605–06, 643 (2001).

38. See Gunlicks, *supra* note 37, at 605.

39. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 364 (1998).

40. *Dastar Corp. v. Twentieth Century Fox Corp.*, 539 U.S. 23 (2003).

41. Gunlicks, *supra* note 37, at 643.

42. Antezana, *supra* note 30, at 428.

43. *Dastar*, 539 U.S. 23.

I. "Confounded in the Dust, Adore That Power";<sup>44</sup> Or, the Foundations of British Copyright Law

A. The Stationers' Copyright and a Property Right in Copies.

The age of printing began in Great Britain in 1476, the year William Caxton introduced the printing press to England.<sup>45</sup> As early as the fourteenth century, however, several guilds of tradesmen, specially trained in book production, had organized in medieval London.<sup>46</sup> Over the span of eighty years following the printing press's introduction, the guilds and their printing-age equivalents united to form the Stationers' Company, which, in 1557, was granted quasi-legislative and judicial powers to regulate the printing industry.<sup>47</sup> The Company's status as a royally sanctioned monopoly, allowed it to control which authors and what content was printed, and because it abided by the social order, that so preoccupied the monarchs, the Stationers' Company played a critical role in the development of Anglo-American copyright law, ensuring that the interests of copyright holders would be forever subordinated to the public interest.<sup>48</sup> Also, while the Company respected authors' interests in the integrity of their texts, it did so more out of courtesy than obligation.<sup>49</sup> Only the intervention of a monarch on a creator's behalf could truly prevent a publisher from altering the original work.<sup>50</sup>

The link between the public interest and copyright first manifested itself in the guise of censorship.<sup>51</sup> Just a decade after the printing press's introduction, the royal family began to recognize that an unfettered press could become an effective means for proliferating controversial religious and political doctrines.<sup>52</sup> More to the point, the monarchs understood that *printers* of seditious or heretical materials—capable of producing thousands of volumes in a relatively short span of time—possessed a far greater capacity to undermine the throne than the *authors* of those very same works, for it was the printers who had access to the means of reproduction.<sup>53</sup> Thus, rather than proscribing the creation of inflammatory writings, censorship decrees largely targeted those with access to the printing presses.<sup>54</sup>

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44. JAMES THOMSON, *Winter*, in 1 THE POETICAL WORKS OF JAMES THOMSON, *supra* note 1, at 183.

45. RANSOM, *supra* note 2, at 6.

46. CYPRIAN BLAGDEN, THE STATIONERS' COMPANY: A HISTORY, 1403-1959, at 22 (1960).

47. *Id.* at 23-33. The four pre-printing press trades involved in the production of books were the parchminer, the scrivener, the lymner, and the bookbinder. *Id.* at 22.

48. *See generally id.* at 23-33.

49. *See* JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 28-33 (1994).

50. *Id.*

51. RANSOM, *supra* note 2, at 24-25.

52. *See id.* at 29-31.

53. *See* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 23 (1968).

54. The U.S. Supreme Court has regarded laws restricting the freedom of printers as archetypal censorship statutes. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).



As early as 1486 to 1487, Henry VII banned the printing of “forged tydings and tales and seditious Rumors.”<sup>55</sup> After sedition, heretical materials were next on the list: the budding Protestant Reformation, fueled by the proliferation of Martin Luther’s Reformation literature,<sup>56</sup> caused Henry VIII to follow in his father’s footsteps and institute the first censorship decree regarding religious texts in 1529, “for resysting and withstanding of most dampnable Heresyes / sowen within this realme / by the disciples of Luther and other Heretykes / perverters of Christes Relygion.”<sup>57</sup> In 1538, recognizing that his royal decree did nothing to stop the flow of subversive texts, Henry VIII instituted a licensing system, requiring printers to submit works that they intended to publish for examination by the royal licensers.<sup>58</sup>

Between 1538 and 1557, a succession of monarchs concocted numerous licensing schemes to smother dissent—with varying degrees of failure.<sup>59</sup> Finally, Queen Mary, recognizing that her own licensers lacked the skill and resourcefulness to flush out illicit publishers, yielded to the Stationers’ Company’s lobbying efforts and chartered it as the only body in England whose members could be licensed to print literary works.<sup>60</sup> The Stationers’ Company, which clearly had a financial motive to see competing publishers throughout the country go out of business, benefited the monarchy by providing “a convenient bottleneck where the content of the books and other printed articles could be examined.”<sup>61</sup> Though not explicitly within its purview, the Company also claimed the Crown’s licensing authority, so that Stationers’ Company wardens reviewed and licensed manuscripts according to the monarch’s standards.<sup>62</sup>

Copyright, literally meaning the *right* to make *copies*, was born of this symbiotic arrangement between printers and monarchs. At the time, the monarchs were motivated far more by their desire to control the ability of printers to publish unauthorized works than by a noble wish to vest

55. PATTERSON, *supra* note 53, at 23 (quoting Proclamation Number 7, *reprinted in* 1 STEELE, *TUDOR AND STUART PROCLAMATIONS, 1485-1714*, no. 7 (1910)).

56. Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 31 n.187 (2001/2002) (quoting 7 PHILIP SCHAFF, *HISTORY OF THE CHRISTIAN CHURCH* 156 (1890)).

57. PATTERSON, *supra* note 53, at 23 (quoting Proclamation Number 114, *reprinted in* 1 STEELE, *TUDOR AND STUART PROCLAMATIONS, 1485-1710*, no. 114 (1910)).

58. BLAGDEN, *supra* note 46, at 30-31 (1960); RANSOM, *supra* note 2, at 25; Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 23 (2001).

59. See BLAGDEN, *supra* note 46, at 29 (noting that the monarchs during that period—Henry VIII, Edward VI, and Mary—were widely disliked and needed censorship for political survival).

60. See PATTERSON, *supra* note 53, at 29; Birnhack, *supra* note 58, at 23.

61. Birnhack, *supra* note 58, at 23. Over a century later, Judge Aston likely mirrored the prevailing British sentiment on these two monarchs when, in the midst of his opinion in *Millar* he refuted plaintiff’s arguments that these rulers’ decrees were indicative of the preexisting common law by referring to Henry VIII as “as despotie a prince as ever sat upon the throne” and to Queen Mary as “his bigotted [sic] daughter.” *Millar v. Taylor*, 98 Eng. Rep. 201, 239 (1769).

62. PATTERSON, *supra* note 53, at 40. However, ministers were the chief licensers of important religious tomes. *Id.* at 41.

authors with great power to control the publication of their own works.<sup>63</sup> Nonetheless, even at its formative state, the Crown had linked the copyright monopoly to its enduring legacy—that printed literature could be regulated to promote the public good.<sup>64</sup> Because prospective publishers had to formally license a work to register it and get the benefit of a valid copyright, which guaranteed the copyright owner perpetual protection against infringers,<sup>65</sup> prospective publishers had an incentive to conform to the monarch's conception of what types of work were most conducive to a harmonious society.

Although booksellers would later argue that a separate common law system flourished alongside the statutory scheme,<sup>66</sup> England's history of copyright dating to the introduction of the printing press does little to bolster that claim. To the contrary, the historical record establishes that prior to the Stationers' Company charter, "there was no copyright as such and no protection against piracy."<sup>67</sup> It was only after the charter and the Star Chamber decrees that the Company was empowered to prosecute and shut down illegal print shops, and transformed its Court of Assistants into a widely used arbitral body for grievances concerning literary property.<sup>68</sup> From its birth, then, copyright in Great Britain was largely a product of regulatory devices.

## B. The Development of the Author's Property Right

From 1557 to 1649, the Stationers' Company was the only body that could grant a copyright backed by decrees promulgated by the Star Chamber.<sup>69</sup> While publishers often asserted their rights in front of the Court of Assistants, authors did not.<sup>70</sup> In fact, during the sixteenth and seventeenth centuries, when booksellers, printers, monarchs, and Parliament were all vying for control of the burgeoning book trade, no authors asserted *any* rights in British courts.<sup>71</sup> It may be assumed, then, that they thought they had no rights that were justiciable, save the ownership right in their manuscript prior to its sale.

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63. See Joffrain, *supra* note 22, at 748 (commenting that "copyright law is traditionally traced back to . . . a 1556 English royal decree, and the desire for censorship").

64. RANSOM, *supra* note 2, at 24.

65. FEATHER, *supra* note 49, at 17–18, 25–26. Mark Rose considers the Stationers' Company to have presided over "a regime of regulation, rather than a regime of property." MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 15 (Harvard Univ. Press, 1994).

66. Dallon, *supra* note 3, at 413.

67. *Id.* at 372.

68. FEATHER, *supra* note 49, at 24–28. Feather does note that "the idea of rights in copies . . . was well-established before the end of the 1580's," and the Court of Assistants was a preexisting institution, but it was only through the decrees that such practices received royal sanction as opposed to simply constituting local custom. See *id.* at 25.

69. RANSOM, *supra* note 2, at 29, 36.

70. *Id.* at 12. The Court of Assistants, which decided issues of literary property, was comprised of magistrates were required to be either a printer or a bookseller. *Id.*; BLAGDEN, *supra* note 46, at 158.

71. ROSE, *supra* note 65, at 21.

Authors' social status had always come from the patronage system, by which a monarch or nobleman commissioned an author to pen works on his behalf, and bestowed on him "material and immaterial rewards."<sup>72</sup> In essence, the author's role as a servant of the nobility translated into an understanding that the author had no rights independent from those of his patron.<sup>73</sup> Although the advent of the printing press infused authors with more freedom to act independently, they continued to work according to the patronage mentality.<sup>74</sup> An author generally would cede all his ownership interests to the bookseller purchasing his work, and the bookseller would then petition the monarch for exclusive publishing privileges and submit the work for review by government censors.<sup>75</sup> Thus, when a Stationers' Company bookseller bought an author's manuscript, the bookseller automatically assumed all rights associated with that work.<sup>76</sup> Consequently, authors ceded the ability to control the "form and content of [their] writings."<sup>77</sup>

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72. *Id.* at 16.

73. Note, *supra* note 10, at 2440 ("Much as feudal lords owned title to the products that vassals extracted from their lands, patrons enjoyed the attribution of authorship to creative works. Writers served patrons as craftsmen, and the patron 'symbolically took title' to a work he endorsed.").

74. See ROSE, *supra* note 65, at 17.

75. Dallon, *supra* note 3, at 381; David E. Miller, *Finding a Conflicts Issue in International Copyright Litigation: Did the Second Circuit Misinterpret the Berne Convention in Itar-Tass?*, 8 CARDOZO J. INT'L & COMP. L. 239, 248 (2000). Miller succinctly explains the origin and functioning of the privilege system as follows:

While the printing press enabled printers and publishers to quickly reproduce authors' books, it also enabled "pirates" to reproduce and profit from the sale of unauthorized copies of such works. Printers and publishers, whose very existence was challenged by these "pirates," petitioned their kings for protection in the form of an exclusive right, or "privilege." This "privilege" gave a printer or publisher the exclusive right to reproduce and sell an author's work; in essence, the sovereign gave the printer or publisher a limited monopoly over a specific book. In return, this monopoly effectively enabled the sovereign to review all books prior to publication for politically or socially subversive content, with the purpose and result that such materials should not reach a sizeable audience.

Miller, *supra*.

76. ROSE, *supra* note 65, at 18. Rose notes the following:

A playscript after it left the playwright's hands was no more the author's property "than the cloak that he might have sold to the actors at the same time" . . . Once purchased, a script, like a cloak, might be shortened or lengthened or refurbished entirely according to the needs of the company and without consulting the author.

*Id.* As an example of authors' marginal roles, Rose points to *Ponder v. Braddill*, 4 Burr 2303, 2317, 98 ER 201, 209 (1679):

Nathaniel Ponder, the publisher of [author] John Bunyan's *Pilgrim's Progress*, took legal action . . . against Thomas Bradill [sic], who had brought out a competing edition of the book . . . . What is significant . . . is how little the issue had to do with Bunyan as author; indeed Ponder does not appear even to have called on Bunyan to give evidence in court . . . . Evidently, so far as Ponder was concerned . . . the "book" belonged to the printer.

*Id.* at 22-23.

77. See ROSE, *supra* note 65, at 32 (stating that dissenters in the House of Lords to the 1693 renewal of the Licensing Act was precipitated by their awareness that the licensing system deprived authors of their voice).

Inspired by the Renaissance, the conception of authorship changed incrementally from that of the Middle Ages, when authors were consigned to the periphery of the publishing business, to a modern one where authors were autonomous individuals whose work flowed from an intensely personal process.<sup>78</sup> John Milton contributed greatly to the emergence of the individualistic author when, in 1644, he delivered his prose masterpiece *Areopagitica*.<sup>79</sup> Published the year after the passage of the Order of the Lords of Commons of 1643, a new set of orders barring unlicensed (i.e. uncensored) printing,<sup>80</sup> and, having himself been put on the licensors' blacklist due to his publication of a controversial work on divorce,<sup>81</sup> Milton delivered an anti-licensing oratory, which to contemporary ears still resembles a free speech anthem.<sup>82</sup>

In his speech, Milton disputed that any mere mortal could be entrusted with the momentous task of deciding what books the public should be allowed to read.<sup>83</sup> He emphasized that judges of books must be of uncommon education and judiciousness.<sup>84</sup> Comparing the current licensing system to the late Spanish Inquisition, Milton drew a sharp distinction between the progressive, democratic England of his aspirations and her less civilized neighbor on the mainland.<sup>85</sup> It is telling, however, that in *Aeropagatica*, one of the first pieces by an author in support of authors, Milton championed authors' individuality, but not authors' rights.<sup>86</sup> In contrast to early French authors,<sup>87</sup> Milton's main objection to the licensing act was unrelated to "moral" concepts such as the right to integrity, but was rather an objection to government-imposed restraints on trade and to monopoly.<sup>88</sup> Thus, for Milton, the development of the author as an individual with a unique personality meriting great deference did not coincide with a belief that this personality warranted special legal protection.

Eventually, however, authors did succeed in gaining stature as the proper owners of their literary works. The Star Chamber, hated as it may

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78. *Id.* at 18, 28-30.

79. *Id.* at 28.

80. RANSOM, *supra* note 2, at 71, 130-31.

81. *Id.* at 71. The work in question was John Milton's *The Doctrine & Discipline of Divorce*.

82. JOHN MILTON, *AREOPAGITICA* (J.C. Suffolk ed., Univ. Tutorial Press, Ltd. 1968) (1644). *Aeropagitica* was styled after the "classical Greek oration," in particular the Greek Isocrates, who in the fourth or fifth century B.C. delivered a speech on democracy to the rulers of Athens. *Id.* at 16. Like Isocrates, Milton delivered *Aeropagitica* in the form of a speech to Parliament before publishing it in complete disregard of the entire licensing system. *Id.* at 1, 15. Ironically, Milton accepted an appointment as a censor-licensor in 1651 and, himself a Protestant, was notably intolerant of aspiring Catholic authors. *Id.* at 15; Birnhack, *supra* note 58, at 24.

83. MILTON, *supra* note 78.

84. *Id.*

85. See *id.* at 136 (referring pointedly to "this authentic Spanish policy of licensing books").

86. See ROSE, *supra* note 65, at 29.

87. See discussion *infra* Part III.A.

88. *Id.*

have been, passed decrees in 1586 and 1637 establishing that literary property could be owned.<sup>89</sup> Booksellers began to form contracts with authors in which, for consideration, the authors would grant the booksellers exclusive publishing rights to their works.<sup>90</sup> Stationers' Company printers would not publish an author's manuscript without first receiving express permission from the author.<sup>91</sup>

Most importantly, the emergence of John Locke's theory of property "furnished copyright doctrine with a ground in natural right that could justify admitting the author. . . as the legal owner of a property in the work."<sup>92</sup> Locke's central argument, that whatever a person "removes out of the State that Nature hath provided" and "mixe[s] his *Labour* with" automatically becomes his property,<sup>93</sup> became a powerful message for authors. Though initially it was booksellers who championed Locke's reasoning, a strategy employed to justify perpetual monopolies in their copyrighted property, they nonetheless stayed true to Locke's vision by arguing that their property rights to a literary work only existed because an author—the original owner—transferred it to them.<sup>94</sup> Furthermore, when authors finally began to assert their own property rights, Locke's theory of property was their starting point.<sup>95</sup>

### C. Millar and Donaldson Interpret the Statute of Anne

#### 1. *The Statute of Anne*

In 1694, due in part to intense lobbying by the ubiquitous John Locke,<sup>96</sup> the House of Commons finally allowed the Licensing Act to lapse, suddenly divesting the Stationers' Company of its monopoly after nearly

89. RANSOM, *supra* note 2, at 8.

90. ROSE, *supra* note 65, at 27 (noting that John Milton's contract for the first publication of *Paradise Lost* "granted to [Samuel] Symons and his executors and assigns 'All that Booke Copy or Manuscript of a Poem entitled *Paradise lost*, or by whatsoever other title or name the same is or shalbe called or distinguished'"). Milton's flexibility regarding the final name of his work further demonstrates that authors of his age were not concerned with issues of integrity, at least with regard to the title of their work, which in modern times could be considered part of the personal expression of authorship. *Id.*

91. PATTERSON, *supra* note 53, at 69-70; ROSE, *supra* note 65, at 17-18.

92. DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 30 (1992).

93. *Id.*

94. See *id.* Ironically, in real life Locke was bitterly opposed to the idea of literary monopoly, given that the Stationers' Company had refused to grant him a license to publish an edition of *Aesop's Fables*. ROSE, *supra* note 65, at 33. He voiced his objection in a letter, arguing:

That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning; and for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.

*Id.* (quoting JOHN LOCKE, *THE MEMORANDUM OF JOHN LOCKE*. KING 202-09).

95. See ROSE, *supra* note 65, at 72.

96. See FEATHER, *supra* note 49, at 50. Locke had argued to Parliament that "the Stationers' monopoly made books too expensive, and that they merely made profits from the fruits of other people's work." *Id.* Then, when the bill came up for renewal, Locke and a number of his supporters once again lobbied the House of Commons; this

150 years as sole guardian of the royal copyright interest.<sup>97</sup> The lapse meant that printers who were not members of the Stationers' Company could finally compete legally for authors' manuscripts.<sup>98</sup> It also meant that, without the requirement of entry in the Stationers' Register, the Company was vulnerable to piracy by rival publishers, who they no longer had the power to shut down.<sup>99</sup> The Company then had no choice but to stoop to petitioning Parliament to pass an act that would statutorily enforce printers' property rights.<sup>100</sup>

In 1709 Parliament responded with the Act for the Encouragement of Learning, better known as the Statute of Anne.<sup>101</sup> The first copyright statute in history, the Statute granted authors a fourteen-year monopoly following the initial publication of a work, with the possibility of renewal for an additional fourteen-year term.<sup>102</sup> Unlike previous royal decrees, which above all were censorship ordinances, the Statute's major purpose was to regulate trade, and thus it contained no censorship provisions.<sup>103</sup> The Statute could be, and often was, used as a sword against unlicensed printers, who faced civil liability for the illicit reproduction of works "without the Consent of the Authors or Proprietors of such Books and Writing."<sup>104</sup>

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may have ultimately been a factor in the government's divesting the Stationers' Company of its previously held power. See *id.*

97. Birnhack, *supra* note 58, at 23-24. Parliament's decision not to renew the Act was the *coup de grace* of a series of setbacks for the once-mighty Stationers. The 1653 Act for the Regulation of Printing vested the Council of State, rather than the Stationers' Company, with the responsibility of judging exclusive printing rights. RANSOM, *supra* note 2, at 73. In 1680, the Stationers failed in their attempt to have the precedents and powers of the Star Chamber transferred to King's Bench. Had their attempts succeeded, this may have paved the way for common law perpetual copyright. *Id.* at 81-82.

98. FEATHER, *supra* note 49, at 65; see Dallon, *supra* note 3, at 400 (asserting that the refusal of Parliament to renew the Licensing Act "was based in part on resentment of the bookselling monopoly that a few publishers had effectively obtained through control of the Company and purchase of major copyrights").

99. FEATHER, *supra* note 49, at 55.

100. Ransom notes that the once-mighty Stationers' Company would never have petitioned Parliament for statutory protection because they would have considered that self-degrading. *Id.* FEATHER, *supra* note 49, at 89.

101. Statute of Anne, 8 Ann., c. 19 (1710) (Eng.). The full title was "[a]n act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies." *Id.* (spelling standardized), quoted in Dallon, *supra* note 3, at 402.

102. Statute of Anne, 8 Ann., c. 19, at 109-117; Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 181 (2000) (noting that the Statute of Anne "mark[ed] the appearance of the terminology of 'authorship' in Western law").

103. Dallon, *supra* note 3, at 402.

104. RANSOM, *supra* note 2, at 109 (quoting the Statute of Anne). While printers and booksellers stood to profit the most from the statutory monopoly, authors of the time also considered this a victory. Daniel Defoe, who had lobbied for the bill's passage, likened literary theft to child-stealing:

A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his Brain; if he sells his Property, it then becomes the Right of the Purchaser; if not, 'tis as much his own, as his Wife and Children are his own—But behold in this Christian Nation, these Children of our Heads are seiz'd, captivated, spirited away, and carry'd into Captivity, and there is none to redeem them.

As straightforward as the Statute of Anne may seem to modern sensibilities, its passage ushered in an era of uncertainty, during which booksellers who had paid valuable considerations for what they had assumed would be a perpetual and exclusive right to publish books, continued to insist that the expiration of the statutory term did not abolish their property right.<sup>105</sup> Conversely, printers with no valid title to the works in question argued that after twenty-eight years, the statute divested the prior owner of any judiciable property rights, allowing *anyone* to publish the work.<sup>106</sup> According to Professor Feather:

On the one hand, there was the prevalent view that property was a natural right, partially ceded to the state, which could be created and, having been created, existed in perpetuity. On the other (hand?), there was the view that all property derived from the Crown, and was therefore subject to the authority of the Crown and its agents, including laws made by the Crown-in-Parliament.<sup>107</sup>

By the 1760's, it was generally acknowledged that authors had a natural property right to their original manuscripts, at least until they sold it and that a bookseller.<sup>108</sup> At stake then was, first, whether booksellers also possessed a natural property right to those copies that constituted a perpetual guarantee against infringement, and, second, whether those rights could coexist alongside the statutory monopoly rights.<sup>109</sup>

## 2. Millar v. Taylor

The two cases deciding the issue both involved the works of the Scottish poet James Thomson. Thomson was the author of a number of widely popular poems, including a compilation entitled *The Seasons*, which contained the previously published works *Winter*, *Summer*, *Spring*, and *Autumn*.<sup>110</sup> In 1729, Thomson sold all rights to publish *The Seasons* to the

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Mark Rose, Lecture, *Copyright and Its Metaphors*, 50 UCLA L. Rev. 1, 5 (2002) (quoting Daniel Defoe, *Miscellanea*, 16 DEFOE'S REVIEW 515 (Arthur Wellesley Secord ed., 1938) (1710).

105. See FEATHER, *supra* note 49, at 68 (noting that "[t]he 1710 Act, if anything, obfuscated rather than clarified the situation.").

106. See Rose, *supra* note 65, at 94 (noting that Scottish bookseller Alexander Donaldson, who "specializ[ed] in inexpensive reprints of standard works whose copyright term had expired," published a "a carefully argued pamphlet against perpetual copyright" several years before his participation in the case of *Donaldson v. Becket*, 1 Eng. Rep. 837 (1774)).

107. Walterscheid, *supra* note 5, at 339.

108. For a general overview of how the courts came to adopt this position, see ROSE, *supra* note 65, at 49-66.

109. Locke himself objected to the concept of perpetual copyright. See *id.* at 33. However, the reigning conception of literary property—that it could be willed and deeded as though it were any other brand of property—demonstrates that in the popular imagination, no qualitative difference existed between literary property and real and personal property. See ROSE, *supra* note 65, at 17-18. But see PATTERSON, *supra* note 53, at 75 (arguing that the transfer of a book was analogous to a negative covenant, rather than an actual sale).

110. SAMUEL JOHNSON, *WORKS OF THE ENGLISH POETS WITH PREFACES, BIOGRAPHICAL AND CRITICAL* (J. Nichols ed., 1779), available at <http://www.hn.psu.edu/Faculty/KKem->

plaintiff, London bookseller Andrew Millar,<sup>111</sup> who promptly printed two thousand copies, followed by a second printing of one thousand in 1763.<sup>112</sup> Without permission from Millar, Scottish bookseller Robert Taylor subsequently printed one thousand copies of *The Seasons*.<sup>113</sup> Millar sued Taylor in equity seeking an injunction and damages, demanding that Taylor forfeit to him all unsold copies of his pirated version of *The Seasons*.<sup>114</sup>

Over twenty-eight years had elapsed since the original publication of *The Seasons*, so that if the court found that no common law copyright existed, this would enable Taylor or any other Brit to freely copy previously published works upon the expiration of the statutory period.<sup>115</sup> On the other hand, if the court held that there was a cause of action at common law, notwithstanding the statute's restrictions, Millar and his heirs would be entitled to a perpetual copyright. As framed by the Court of Chancery, the question was whether the Statute of Anne constituted a new set of rights protecting authorship, or simply codified an author's preexisting rights.<sup>116</sup>

The court was split—a highly unusual occurrence<sup>117</sup>—and the range of opinions and arguments “still define the battle lines drawn to this

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merer/poets/thomson/default.htm. Arguably, it was “uncannily appropriate” for *The Seasons* to be the subject of the lawsuits that defined British copyright law, because Thomson, having drawn inspiration for his poetry from his observations of nature, perfectly embodied the Lockean ideal. ROSE, *supra* note 65, at 113–14.

111. Millar alleged that he paid “valuable and full consideration” to retain all rights to *The Seasons* “to him and his heirs and assigns for ever.” *Millar v. Taylor*, 98 Eng. Rep. 201, 203 (1769).

112. *Id.* at 202–03.

113. *Id.* at 203. For more on the strife between London and Scottish booksellers, see ROSE, *supra* note 65, at 69.

114. *Millar*, 98 Eng. Rep. at 205, 256. Note that the case came to the King's Bench, a law court, not as an appeal, but in order for them to advise the jury in equity on the legal status of ownership of a copyright under the Statute of Anne. *Id.* at 204 (“But whether . . . the said Robert Taylor is liable in law to answer the damages sustained by the said Andrew Millar . . . the jurors aforesaid are altogether ignorant; and therefore pray the advice of the Court here.”).

115. The Right of Publication, or the Right to Divulge, is one of the moral rights recognized by the French. See Joffrain, *supra* note 22, at 762.

116. See *Millar*, 98 Eng. Rep. at 206. Specifically, the questions before the justices to answer were “1st. Whether the copy of a book, or literary composition, belongs to the author, by the common law: 2d. Whether the common law-right of authors to the copies of their own works is taken away by [the Statute of Anne].” *Id.*

117. The opinion of Justice Yates, the lone dissenter, demonstrates how unusual his position was: He wrote that his dissent “may seem to require some apology” for having “taken up so much time,” given that he had “the misfortune to be alone in” his opinion, yet insisted that this was his “sincere opinion.” *Id.* at 248. While disagreeing with Yates on the outcome, Lord Mansfield himself emphasized that this was an unprecedented deadlock amongst the justices: “This is the first instance of a final difference of opinion in this Court, since I sat here. Every order, rule, judgment, and opinion, has hitherto been unanimous . . . . In short, we have equally tried to convince, or be convinced: but, in vain. We continue to differ.” *Id.* at 250–51. Mansfield had served as the Chief Justice of the King's Bench since 1756 (thirteen years prior to this case). For a biographical summary of Mansfield, see William Murray (*Lord Mansfield*) 1705–1793, at <http://law.wlu.edu/faculty/history/brockenbrough/mansfield.htm> (last visited Feb. 3, 2004).



day.”<sup>118</sup> Chief Justice Lord Mansfield, historically a staunch supporter of authors’ rights, led the majority in holding that the Statute of Anne did not foreclose an author’s common law property right.<sup>119</sup> Having framed the question as “whether it is agreeable to natural principles, moral justice and fitness” for an author to retain the same unlimited property right in his work *after* publication as he possessed *before* publication, Mansfield began by reasoning that “for ages” such a right had existed.<sup>120</sup> If the legislature wanted to dissolve such a historic, natural right, Mansfield reasoned, it would have expressly mentioned that in the text of the Statute.<sup>121</sup>

Justice Aston concurred with Mansfield and applied classic Lockean theory, arguing that intellectual property was, for all practical purposes, no different than tangible property, and that the author retained all ownership rights in his work, even after publication: “Can it be conceived, that in purchasing a literary composition at a shop, the purchaser ever thought he bought the right to be the printer and seller of that specific work?”<sup>122</sup> Aston recognized no difference between the labor exerted in erecting a wall with one’s hands, and that required to write a book; therefore, just as trespass would lie if a stranger attempted to claim that wall as her own, so too illicitly copying the contents of a previously published book would constitute usurping another’s labor:

[T]o deprive a man of the fruit of his own cares and sweat; and to enter upon it. . . as if it was the effect of the intruder’s pains and travel; is a most manifest violation of truth: it is asserting, in fact, that to be his, which cannot be his. . . . [I]t is incompatible with the peace and happiness of mankind, to violate or disturb, by force or fraud, his possession, use or disposal of those rights; as well as it is against the principles of reason, justice and truth.<sup>123</sup>

Justice Yates, in dissent,<sup>124</sup> forcefully argued that the Statute of Anne clearly limited the monopoly held by the owner of a literary work. Closely examining the statute’s language, he argued that the objective of the twenty-eight year monopoly was to advance learning for the entire nation

118. Syn, *supra* note 56, at 5.

119. ROSE, *supra* note 65, at 69, 78-82.

120. Millar, 98 Eng. Rep. at 253.

121. *Id.* at 256.

122. *Id.* at 222.

123. *Id.* at 220 (internal quotations omitted). Justice Willes, also in concurrence, was an even more emphatic proponent of a perpetual property right vested in the author or his assigns. Willes could not countenance the specter of the masses shamelessly exploiting an author’s honest labor. “It is certainly not agreeable to natural justice,” he opined, “that a stranger should reap the beneficial pecuniary produce of another man’s work.” *Id.* at 218 (emphasis added).

124. Interestingly, prior to becoming a judge, Justice Yates represented authors against booksellers, whereas Lord Mansfield, the Chief Justice, defended booksellers’ interests. L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33, 49 (2002). A commentator has argued that the booksellers prevailed in Millar not on the strength of their legal argument, but because of Mansfield’s influence). *Id.* Given that the authors had already parted with any rights to their works, the commentator argues that the booksellers’ pretence of arguing on behalf of the authors was so implausible that “the ultimate failure of their quest . . . for a perpetual common law copyright” is not surprising. *Id.*

by nourishing "the genius of the nation."<sup>125</sup> Since a perpetual copyright would suffocate the dissemination of knowledge by placing onerous prohibitions on unlicensed copying,<sup>126</sup> "[t]he design of the statute [must have been] to vest a temporary copy-right in authors, and to establish that right for a limited time."<sup>127</sup> Though temporarily defeated, Yates's opinion later formed the theoretical basis for future British and American copyright law.

Millar demonstrates that, while protecting the moral rights of an author was a *policy concern* that might provide guidance to courts in search of equitable judgments, these rights did not exist as *separate causes of action* unto themselves. Mansfield was decidedly unsettled by the prospect of greedy, careless infringers usurping works from an amorphous public domain, and "perpetuat[ing] the imperfections, to the disgrace and against the will of the author[.]"<sup>128</sup> However, while he certainly felt that the reputation of an author had intrinsic value, and that damage to that reputation was an additional reason why the Statute of Anne should not eradicate common law property rights, he by no means proposed that a damaged reputation could form the basis of a claim in copyright.

Justice Yates, meanwhile, actually employed the phrase "moral rights" on several occasions, and labeled it "the most specious"<sup>129</sup> of all of Millar's arguments. However, he did not repudiate moral rights on the ground that they did not constitute a valid cause of action, but rather because he felt that the damage that would result should the property rights of owners of literary works terminate was subordinate to the interests advanced by the Statute of Anne, and therefore irrelevant.<sup>130</sup>

Thus, Lord Mansfield and Justice Yates did ultimately agree in two respects: First, they would each hold that if a natural right to literary property did in fact exist, that right would only be actionable by the work's legal owner. Thus, for example, were Ann Author to sell the rights to her novel to Bob Bookseller, and Bob carelessly printed the novel so that it was rid-

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125. Millar, 98 Eng. Rep. at 246, 250.

126. *Id.* at 250.

127. *Id.* at 247.

128. *Id.* at 252.

129. See generally *id.* at 229-50.

130. *Id.* at 231 (rejecting the moral rights argument as being subservient to the statutory restrictions) (emphasis added). Justice Yates argued:

Mr. Blackstone [plaintiff's counsel] observed that . . . literary compositions, being the produce of the author's own labour and abilities, he has a *moral and equitable right* to the profits they produce; and is fairly intitled to these profits for ever; and that if others usurp or encroach upon these *moral rights*, they are evidently guilty of injustice, in pirating the profits of another's labour, and reaping where they have not sown.

This argument has indeed a captivating sound; it strikes the passions with a winning address: but it will be found as fallacious as the rest, and equally begs the very question in dispute. For, the injustice it suggests, depends upon the extent and duration of the author's property; as it is the violation of that property that must alone constitute the injury . . . . In that case, the defendant cannot be charged with any injustice; but has merely exercised a legal right."

*Id.*

dled with typographical errors, Ann would have no cause of action against Bob under copyright law (though she might under contract), because she would already have transferred to Bob all the sticks in the property bundle. Second, Mansfield and Yates would concur that moral and equitable concerns in copyright law are only relevant in policy considerations and are not autonomous bases for imposing liability.

### 3. Donaldson v. Becket

For five years, the printers had their cake and ate it, too: the Statute of Anne granted them printing monopolies lasting up to twenty-eight years, and Millar assured them a perpetual property interest in their literary property even after the statutory period had expired, but whatever exuberance they felt was short-lived. In 1774, the seminal House of Lords decision in *Donaldson v. Becket*<sup>131</sup> severed natural law from copyright, reversing Millar and vindicating Justice Yates. In *Donaldson*, copyright law was revolutionized, once again, in a fight over James Thomson's poetry. In a nutshell, following his victory in *Millar*, Andrew Millar's heirs sold the rights to several of Thomson's poems to Thomas Becket and another group of London printers in an estate sale.<sup>132</sup> The new owners immediately filed an injunction to halt the illicit publishing of *The Seasons* by Scotsman Alexander Donaldson, and, based on *Millar*, the Court of Chancery granted the injunction.<sup>133</sup> However, Donaldson had recently won a similar action involving his unauthorized printing of *Stackhouse's Bible* in Scotland's own Court of Session, which was not bound by British common law and clearly more favorable to promoting the interests of Scottish printers.<sup>134</sup>

Donaldson then used his *Stackhouse* victory as leverage and appealed the *Becket* decision to Britain's highest court, the House of Lords, whose thirty-three members<sup>135</sup> summoned an advisory panel of the twelve common law judges<sup>136</sup> from the King's Bench, Court of Common Pleas,<sup>137</sup> and the Exchequer. The Lords submitted a series of five questions to the advisory panel to help guide them in resolving the dispute.<sup>138</sup> The first question was whether authors had an exclusive right to be the first to print and

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131. *Donaldson v. Becket*, 1 Eng. Rep. 837, 837-49 (1774).

132. ROSE, *supra* note 65, at 95. In a turn of events that would provide a perfect ending to a Victorian novel, Millar died on the day after the completion of oral arguments in *Millar v. Taylor*, and the justices announced that they would defer deciding the case until the next term. *Millar*, 98 Eng. Rep. at 201-02. Then, Millar's heirs sold Thomson's poems to Beckett at auction for £505, a hefty profit on the £105 he had paid 40 years earlier. *Donaldson*, 1 Eng. Rep. at 838.

133. ROSE, *supra* note 65, at 95.

134. *See id.*

135. The House of Lords actually "decided cases by a general vote of . . . lawyers and laymen alike." *Id.* at 97. The twelve common law judges would "hear the arguments of counsel and . . . give their advice on matters of law, after which the peers would debate the issue and vote." *Id.* at 97-98.

136. However, only twelve judges decided the case, as Lord Mansfield, "[f]or reasons known only to him," did not take part in the vote. Walterscheid, *supra* note 5, at 344.

137. For an insightful discussion about the origins of this intermingling of Parliament and the judiciary, see *id.* at 340-44.

138. *See ROSE, supra* note 65, at 98.

publish their works and whether they could enforce this right against anyone who did so without their permission.<sup>139</sup> The advisory judges found, 8 to 3, that under the common law, authors did have such a right.<sup>140</sup> The second question was whether authors could pursue legal remedies against infringers even after publication, and the judges found 7 to 4 that they could.<sup>141</sup> The crucial third question was whether the Statute of Anne displaced the common law cause of action or authors retained a perpetual property right in a copyrighted work despite statutory limitations.<sup>142</sup> The advisory judges found that authors *did* retain such a right, echoing the *Millar* majority.

However, the Lords rejected the panel's advice on the third question, and held, by a substantial 22 to 11 margin, that post-publication common law property rights *never existed in the first place*, and that therefore Statute of Anne's maximum twenty-eight year term was in fact the only legal protection to which authors were entitled.<sup>143</sup> By extension, the *Donaldson* decision excluded the possibility of moral rights based on common law. Even had the Lords *agreed* with the panel of judges and held that copyright encompasses both a common law and statutory rights, there is still no indication that British jurists contemplated even a nascent conception of moral rights. Thus, in 1774, on the eve of the American Declaration of Independence, even the most robust reading of Britain's conception of natural law authors' rights paralleled the classic Lockean formulation of property rights, according to which all property interests instantly terminate with the transfer to a new owner. True, even after an author sold a copyright, he still possessed residual interests in the integrity of his work, but certainly even those interests no longer existed upon the expiration of the monopoly. As will be seen in Part III, a work's entrance into the public domain did little to deprive French authors' ability to claim moral rights violations.

## II. "In Pride of Youth, and Felt Through Nature's Depth";<sup>144</sup> Or, United States Copyright Comes of Age

### A. The Constitution

Locke's labor theory of property was more immediately applicable within the British colonies of the New World than in post-feudal Europe, because the prospect of expansion into unclaimed virgin territory provided many opportunities for people to mix his labor with nature.<sup>145</sup> In fact,

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139. *Id.*

140. *Id.*

141. *Id.*

142. See *id.* at 98. The result of the vote for the third question is mired in controversy. For a discussion of the evidence that the vote actually was in favor of artists' rights, despite the way it is recorded in the official reports, see ROSE, *supra* note 65, at 154-58. But see, e.g., Syn, *supra* note 56, at 6 (determining that "the judges concluded, six to five, that the statute extinguished such rights when a work was published") (emphasis added).

143. *Id.* at 6 n.31.

144. THOMSON, *supra* note 1, at 43.

145. See Garon, *supra* note 26, at 1294.

prior to the adoption of the Constitution, twelve colonies had adopted copyright statutes of their own,<sup>146</sup> many of which included language combining a limited monopoly to promote learning and recognition of natural rights.<sup>147</sup>

Notably, all twelve of these colonies provided for statutory copyright limits, either identical or similar to those in the Statute of Anne.<sup>148</sup> It is reasonable then to assume that the colonies had the same purpose in mind: to employ copyright as a catalyst to spur creativity for the public good by granting authors limited monopolies over their work.<sup>149</sup> In short, "all of the ideas [in the colonies] originated in the English history of copyright."<sup>150</sup> Thus, even if a number of colonies linked copyright to natural rights, there is no indication that they construed those rights to extend to post-publication moral rights claims.<sup>151</sup>

When the Founding Fathers drafted the Constitution, their purpose in including the Copyright Clause<sup>152</sup> was to implement, as the British had, a

146. Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 306 (2002). Those statutes would be superseded by the Copyright Clause of the Constitution.

147. See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 528 (1990).

148. Ammori, *supra* note 146, at 306-07.

149. *Id.* at 307. For example, New Hampshire's statute read as follows:

As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind . . .

Yen, *supra* note 147, at 528.

150. Assafa Endeshaw, *Commentary: A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 301 (1996) (quoting PATTERSON, *supra* note 53, at 180).

151. But see Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 999-1000 (1990). As evidence that early American and French copyright law was based, in part, on similar considerations, Ginsburg argues that "[s]ources shortly predating the Constitution . . . indicate American acknowledgement of authors' personal claims." *Id.* One such claim involved Noah Webster, who sought stronger copyright protection for his schoolbooks on the basis that "[m]en of industry or of talents in any way, have a right to the property of their productions." Noah Webster, *Origin of the Copy-Right Laws in the United States*, in A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 173-74 (B. Franklin ed., Burt Franklin 1968) (1843). However, even if this were the case, it cannot be presumed that the colonies would have entertained the possibility that an author, after selling and publishing a work, would have a claim under *copyright* law to protect, for example, the integrity of her work, much less a right of retraction, whereby a work could theoretically be removed from the public domain. See Garon, *supra* note 26, at 1303 (arguing that "[w]ith regard to the right to withdraw a copyrighted work from the marketplace, however, the rift between economic rights and natural rights would prove absolute").

152. U.S. CONST. art. I, § 8, cl. 8. The Clause authorized Congress to pass legislation "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

“public benefit rationale for copyright protection.”<sup>153</sup> Additionally, anecdotal evidence suggests that James Madison, having approved of the decision in *Millar* and possibly not yet aware of its reversal in *Donaldson*, advocated authors’ rights as a competing interest.<sup>154</sup> In Federalist Number 43, Madison wrote that the “copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law.”<sup>155</sup> The Constitution’s vagueness reflected the Framers’ own uncertainty as to whether a perpetual common law property right in copyright could exist alongside a statutory monopoly: the Copyright Clause empowered Congress to legislate in the field of copyright, but did not delineate the effect of such a statute on the common law.<sup>156</sup> Congress defined the scope of that monopoly in the Copyright Act of 1790, mirroring the Statute of Anne and granting authors a maximum of two distinct fourteen-year terms of monopoly,<sup>157</sup> but because of the Founding Fathers’ vagueness, nearly half a century passed during which ambiguity persisted as to whether the common law copyright could coexist with the Copyright Act’s statutory framework.<sup>158</sup>

## B. *Wheaton* and Beyond

The 1834 Supreme Court case of *Wheaton v. Peters*, which paralleled the House of Lords’ decision in *Donaldson*, held conclusively that the Copyright Act superseded authors’ common law rights.<sup>159</sup> According to Professor Garon, “[t]he Court readily recognized the natural right in an author’s work, but further held that the statute divested the right upon publication, in favor of the statutory scheme.”<sup>160</sup> In this way, the Court acknowledged U.S. copyright’s grounding in Lockean natural rights, but also held that those rights were overridden by the Copyright Act’s statutory limitations.<sup>161</sup> Writing for the majority, Justice McLean stated:

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or

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153. Dallon, *supra* note 3, at 423.

154. SAUNDERS, *supra* note 92, at 150–51; Yen, *supra* note 147, at 529.

155. Yen, *supra* note 147, at 529 (quoting THE FEDERALIST NO. 43, at 279 (J. Madison) (Jacob E. Cooke ed., 1961)).

156. Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 11 (2002).

157. Ginsburg, *supra* note 151, at 1001.

158. See SAUNDERS, *supra* note 92, at 151.

159. 33 U.S. (8 Pet.) 591.

160. Garon, *supra* note 26, at 1299.

161. *Id.*

in the sale of his works, when first published.<sup>162</sup>

So there it was. U.S. courts would henceforth accept no copyright claims arising from anything other than federal copyright acts and the Constitution, and therefore any expansion of copyright protection necessarily had to come from Congressional action.<sup>163</sup> Since *Wheaton*, Congress and the courts have repeatedly treated copyright as a creature of positive law.<sup>164</sup> Professor Patterson notes that this policy preference, which echoed throughout U.S. history, is necessary to retain the Founders' calibration of competing interests: "If copyright is an example of natural law property, the rights will be weighted in favor of the copyright holder; if copyright is a marketing monopoly, the rights will be more evenly balanced among author, publisher, and user."<sup>165</sup>

Perhaps the quintessential expression of the anti-natural rights sentiment came in the form of the 1909 Copyright Act, which, in extending the author's monopoly to two twenty-eight year terms, clarified that "the object of all legislation must be. . . to promote science and the useful arts[.]. . . not primarily for the benefit of the author. . . ."<sup>166</sup> Turning to natural rights, Congress reiterated that "[t]he enactment of copyright legislation by Congress under the term of the Constitution is *not based upon any natural right* that the author has in his writing."<sup>167</sup> In this environment, the evolution of a set of moral rights based on natural law was not judicially feasible and would have been contrary to express legislative intent, because positive copyright law, which aims primarily at protecting the public interest, is the inverse to natural law copyright, which focuses on protecting the author's interests. It is to the concept of natural law copyright as it developed in France that this Note now turns.

### III. "Who Can Number up His Labours?"<sup>168</sup> Or, the Dual Evolution of French Copyright

#### A. Authors' Rights in Late Medieval France

Moral rights in France can be traced back to a series of judicial decisions in the mid-nineteenth century and reflect the great influence on the French psyche of Emmanuel Kant's philosophy, which viewed artists'

162. *Id.* at 1298-99 (quoting *Wheaton*, 33 U.S. at 657).

163. See Garon, *supra* note 26, at 1299 (arguing that "[t]he direct consequence of *Wheaton* should not be to reject the natural rights approach from U.S. copyright jurisprudence, but rather to recognize that these rights can be statutorily reframed, though not extinguished").

164. Strowel, *supra* note 16, at 244.

165. L. Ray Patterson, *Nimmer's Copyright in the Dead Sea Scrolls: A Comment*, 38 HOUS. L. REV. 431, 434 (2001).

166. Walterscheid, *supra* note 5, at 383-84 (quoting H.R. REP. NO. 60-2222 (1909), reprinted in MELVILLE B. NIMMER & DAVID NIMMER, 8 NIMMER ON COPYRIGHT, app. 13-1 to 13-31, 13-10 (1999)).

167. Strowel, *supra* note 16, at 244-245 (quoting MELVILLE B. NIMMER & DAVID NIMMER, 8 NIMMER ON COPYRIGHT, iv, app. 13-9) (1992) (emphasis added).

168. JAMES THOMSON, *A Poem Sacred to the Memory of Sir Isaac Newton*, in 2 THOMSON'S POETICAL WORKS 175, 179 (London, Bell and Daldy Fleet Street 1866).

rights as grounded in personality rights rather than in traditional property rights.<sup>169</sup> By the mid-twentieth century, German philosopher Joseph Kohler's theory that creative works generate personality rights that are either patrimonial, that is granted by the state, or moral, reinforced the trend in French jurisprudence that favored granting ever-stronger moral rights to authors.<sup>170</sup> In 1957, the French Parliament legitimated the groundswell of support for moral rights by passing legislation protecting the rights of paternity, disclosure, withdrawal, and integrity.<sup>171</sup>

However, looking back through the warped glass of history, France's author-centric approach seems to date back much farther than the nineteenth century. While it is difficult to pinpoint exactly when the concept of a natural law copyright first emerged,<sup>172</sup> it is clear that French authors were far more active in asserting moral rights than their British counterparts, and did so as early as at the turn of the sixteenth century. In her research on the evolving authorial voice in the late fifteenth and early sixteenth century French texts, Professor Brown demonstrates that several French authors relied on the courts to vindicate their moral rights when they argued that their works had been violated in some significant respect, and that the courts consistently upheld their claims.<sup>173</sup> Brown points to evidence of a "sustained effort on the part of . . . writers to protect their works through lawsuit[s]. . . as early as the first decade of the sixteenth century."<sup>174</sup> While prior to 1710, British authors never opposed the prevailing property regime, which required that they cede all rights in their works following the initial sale to the buyer of their manuscript, late medieval French *rhétoriqueurs* (poet-historians) recognized "their inherent rights to their own words" and joined together in challenging infringing printers—both in and out of court.<sup>175</sup>

The first known lawsuit involving a French author was initiated in 1504 by André de la Vigne, who sued printer Michel le Noir for attempting

169. See, e.g., Liemer, *supra* note 19, at 42; Rosen, *supra* note 4, at 157; Suhl, *supra* note 20, at 1208.

170. Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 27–28 & n.31 (1988) ("Although [Kohler] agreed with Kant, Gareis, and Gierke in viewing a work as the expression of the author's personality, he also recognized a property aspect to a work: its economic value.").

171. *Id.* at 6–7 (discussing CODE CIVIL [C. CIV.] art. 543, CODE PÉNAL [C. PÉN.] arts. 425–29 (Law of March 11, 1957 on literary and artistic property)). This departure from what Mitchel Lasser calls the "official French portrait" of a passive judge mechanically applying statutes to cases is actually a frequent—though rarely admitted—occurrence in French jurisprudence. See generally Mitchel de S.-O.-L'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995). Lasser argues that French judges are frequently influenced by academic authorities in shaping their jurisprudence, and feel that it is their duty to step in and provide guidance when there are gaps in the law. *Id.* at 1344–46, 1408.

172. SAUNDERS, *supra* note 92, at 77–78.

173. See generally CYNTHIA M. BROWN, *POETS, PATRONS, AND PRINTERS: CRISIS OF AUTHORITY IN LATE MEDIEVAL FRANCE* (1995) (discussing the relationship between French authors and the judicial system).

174. *Id.* at 3.

175. *Id.* at 3–4.



to reproduce his *Vergier d'honneur* without his permission. De la Vigne had previously retained the services of printer Pierre le Dru to publish two editions of *Vergier d'honneur* and did not take kindly to le Noir's attempt to derive a windfall from de la Vigne's labor.<sup>176</sup> Brown also submits that "[i]t is likely that he challenged le Noir for moral reasons. . . calling into question the printer's right to publish his writings without his consent."<sup>177</sup> The court decided in favor of the author, granting him a one-year monopoly over the printing of *Vergier d'honneur*, after which the work would enter into the public domain.<sup>178</sup>

Already the French experience diverges significantly from that of the British. English cases, such as *Donaldson* and *Millar*, typically involved various combinations of booksellers and printers fighting over property rights to books that had long since left their authors' hands.<sup>179</sup> However, it was the author de la Vigne, not the printer le Dru, who sued le Noir in this case, and it was to de la Vigne, not le Dru that the court granted the one-year monopoly of printing.<sup>180</sup>

The experience of another French author, Jean Bouchet, is also interesting in its invocation of a number of themes related to modern moral rights.<sup>181</sup> In 1503 and 1504, in what would today be grounds for a moral rights hat trick involving the rights of divulgation, attribution, and integrity, printers Antoine Vérard<sup>182</sup> and le Noir published Bouchet's work, *Regnars traversant les perilleuses voyes des folles fiances du monde* ("Regnars"), before Bouchet had completed revising it (violating Bouchet's right to divulgation); displayed the name of better-known author Sebastian Brant instead of Bouchet's on the title page (violating Bouchet's right to attribution); and printed it with numerous errors and unauthorized insertions and deletions (violating Bouchet's right to integrity).<sup>183</sup> Incensed, Bouchet blasted the printers in a later writing, accusing them of being "more interested in filling up their purses than in their honor or mine", and

176. *Id.* at 3, 18-19.

177. *Id.* at 19.

178. *Id.*

179. While Saunders argues that, "[i]n France as in England, a rhetoric of the author's right in literary property was a routine instrument of publishers' interests," he does not explain why only French authors took an active interest in defending their own rights as well. SAUNDERS, *supra* note 92, at 83 (emphasis added).

180. See BROWN, *supra* note 173, at 19. Brown points out that de La Vigne likely had something to gain by winning an injunction against le Noir, since French authors often received compensation derived from the printing of their works. *Id.* In contrast, English authors of the same period were only paid once—when they delivered the manuscript—and "depended upon [their] bookseller's generosity." See RANSOM, *supra* note 2, at 34 (stating "in the reign of Elizabeth, hack writers were seldom paid twice").

181. See BROWN, *supra* note 173, at 21-28.

182. Verard is historically significant, being the first Frenchman to be awarded an exclusive rights privilege, in 1507. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 292 n.42 (1970). Then-Professor Breyer included this detail in his article to demonstrate that printers were originally the beneficiaries of early copyright protection, to the exclusion of authors' interests. *Id.* at 292.

183. BROWN, *supra* note 173, at 21-23.

setting the record straight by informing his readers that the printers had “found a way to take some of my short compositions[,] printed them incorrectly[,] and devised their own title for them.”<sup>184</sup>

Bouchet subsequently sued Vêrard on the grounds that Vêrard had added material from another work in his edition of *Regnars* and won his case “based on the argument that a publisher did not have the right to tamper with an author’s words.”<sup>185</sup> Even after this settlement, Bouchet kept up the attack, labeling printers “repressors of poets,” ridiculing their carelessness in converting manuscript to print, and denouncing their injurious and offensive practice of corrupt[ing] the ideas of the writer in a later work.<sup>186</sup>

This sequence of events is noteworthy in several respects: First, it demonstrates that Bouchet felt deeply violated by Vêrard, not merely due to the economic impact of his infringement, but also because of the damage inflicted on his reputation. Second, Bouchet clearly had modes of recourse that British writers did not have. Unlike his British counterparts, who were compelled to publish their works with the royally sanctioned Stationers’ Company, which was authorized to censor any inflammatory material, Bouchet could speak out in his own interest, inside and outside of court. Third, Bouchet’s actions show that he viewed himself as “the originator of a literary text,” and not simply one cog in the publishing wheel.<sup>187</sup>

The argument in favor of an early division of printers’ (economic) rights and authors’ (moral) rights is clearest in the case of Jean Lemaire.<sup>188</sup> In 1504, le Noir pirated Lemaire’s book, *Temple d’honneur et de vertus*, from Vêrard, to whom Lemaire had granted publishing rights. The unauthorized printing was replete with misspellings.<sup>189</sup> Therefore, in the title page of his next book, *Légende des Vénitiens*, Lemaire strategically included on the title page the full text of the three-year royal privilege, which granted Lemaire exclusive publishing rights to his work and which he had obtained from the king, in effect daring unscrupulous printers to cross him again.<sup>190</sup> He also made clear that he had personally published *Légende des Vénitiens* with his own money, and that he therefore retained full ownership of the work.<sup>191</sup> In sum, Lemaire’s message could be interpreted as a broadcast to the world that he possessed economic rights to his book and that he would take action if his moral rights were violated.

Granted, not all French authors were able to protect their works in the same way as de la Vigne, Bouchet, and Lemaire. These authors were part of an elite: each had royal backing and was likely able to protect his moral

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184. *Id.* at 23, 25.

185. *Id.* at 27.

186. *Id.* at 27.

187. *Id.* at 28.

188. *See id.* at 41–53.

189. Even the original author’s name was butchered—le Noir transformed “Jean Lemaire” into “Jehan le Maistre” on the title page. *Id.* at 48.

190. *See id.* at 49–51.

191. *Id.* at 52.

rights to an extent that lesser-known authors was not.<sup>192</sup> However, many British authors were also beneficiaries of special printing privileges and patronage relationships until the civil war in 1640.<sup>193</sup> Why were they mostly absent from courtrooms until the eighteenth century, when English author Alexander Pope began making regular appearances?<sup>194</sup> And why did early French authors feel entitled to defend what they considered their inherent rights—both economic and noneconomic—without any legislation to guide them,<sup>195</sup> while British authors only began entering the courtroom after the Statute of Anne explicitly granted them a positive right?<sup>196</sup>

None of these questions have easy answers; however, eliminating the experiences of sixteenth century French authors from inquiries into the origin of moral rights skews the empirical data and the conclusions that one can draw from that data.<sup>197</sup>

## B. The Legacy of the French Revolution

The French Revolution of 1789, led by antireligious and antimonarchical forces, was influenced by the dual manifestos of the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen. These documents stirred the populace to rise up against the remnants of feudalism and install a government that would recognize man's natural rights to life, liberty, and property.<sup>198</sup> For the first time, any man could "move laterally and vertically in society[,] a reaction against the tendency under feudalism to fix a man in a place and status."<sup>199</sup> Citizens of post-revolutionary France glorified secularism and were confident that, in the Age of Reason, they could sweep away preexisting laws, which favored a rigidly hierarchical class structure, and replace them with new laws, "rationally derived from unimpeachable first principles."<sup>200</sup> One of those principles was artistic autonomy.<sup>201</sup>

Prior to the French Revolution, the monarch—"God's earthly representative"—controlled the form and dissemination of cultural symbols.<sup>202</sup> It

192. See Swack, *supra* note 39, at 369-70.

193. ROSE, *supra* note 65, at 16-17.

194. See *id.* at 59.

195. See Peeler, *supra* note 21, at 429 (noting that France enacted its first copyright law in 1793).

196. See ROSE, *supra* note 65, at 59 (noting that in 1729, John Gay was the first English author to go to court, although Alexander Pope was the first "to make regular and repeated use of the statute").

197. For an example of an approach grounded in nineteenth-century French jurisprudence, see Charles A. Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine*, 20 INT'L & COMP. L.Q. 675 (1971). Even Calvin D. Peeler, who claims to have traced the judicial origins of French moral rights back to the earliest cases where these rights were articulated, begins his inquiry in the eighteenth century. See Peeler, *supra* note 21, at 427-33.

198. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 15 (1969).

199. *Id.* at 17.

200. *Id.* at 16.

201. See generally Peeler, *supra* note 21, at 429.

202. *Id.* at 426.

was he who granted authors literary privileges, and he expected their works to magnify his fame and express his personality.<sup>203</sup> These writings and other works of art became obvious targets for revolutionaries, who called for the destruction of the ancient regime.<sup>204</sup> The individual was thrust to the forefront, and works of art were presented as “examples of the free spirit.”<sup>205</sup> In 1793, Parliament passed the first French copyright act, modeled after the Statute of Anne.

However, the apparent transplant of the economic rights embodied in the Statute of Anne does not signify that the French struck the same balance between the public good and an author’s incentive as the British or the Americans. Soon after the Act’s passage, the French Minister of Justice delivered an oratory to an assembly of magistrates in which he admonished them to always remember that literary property was not “less sacred than other properties in the eyes of the republican magistrate.”<sup>206</sup> Could it be that, like Madison, the Minister of Justice had not yet read the House of Lords’ decision in *Donaldson v. Becket*?<sup>207</sup> That may be one reason, but more importantly, his words demonstrate that the French viewed the arts far differently than the British. While the British intended their copyright statute to promote the public interest, the French saw monopoly as a means by which to increase the prominence of French culture in the world.<sup>208</sup> “[O]ur art,. . . our tastes,. . . our genius,. . . our glory,” said the Minister of Justice, all spring from artists, “who render all nations tributaries.”<sup>209</sup> The public interest was less important than “grant[ing] the most constant protection to the properties of works of the mind.”<sup>210</sup> The newly unified nation adored the creative genius of its authors, and judges soon felt compelled to protect the interests of the state’s cultural heroes.<sup>211</sup>

Far from holding that the copyright act abolished preexisting rights, French judges enshrined copyright’s natural law origin into their jurisprudence.<sup>212</sup> While owners of property inherited from prerevolutionary royal privileges were routinely stripped of their holdings, courts carved out an exception for literary works.<sup>213</sup> In the foundational case of *Veuve Buffon C. Boehmer*,<sup>214</sup> two years after the Revolution, the French Supreme Court used natural rights language to quash<sup>215</sup> a lower-court ruling that had sub-

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203. See *id.*

204. *Id.* at 428–29.

205. *Id.* at 429.

206. *Id.* at 431.

207. See *Donaldson*, 1 Eng. Rep. 837 (marking the turning point in British copyright jurisprudence).

208. See *id.* at 431–32.

209. *Id.* at 432.

210. *Id.*

211. See *id.*

212. See *id.* at 437–41.

213. *Id.* at 438–39.

214. 3 *Journal du Palais*, 415.

215. Because French courts were prohibited from “making” law, courts of appeal did not have the right to “decide” cases on their own; they could merely “quash” lower court decisions and attempt to direct the lower court to decide the question differently the

ordinated literary property rights to common property rights.<sup>216</sup> By 1826, in the case of *Muller C. Guibal*,<sup>217</sup> the French Court officially placed literary property on an equal footing with traditional categories of property. In 1875, the courts rejected the argument that literary property was nothing more than a privilege created by the legislature, and instead determined that it constituted a real property right.<sup>218</sup> French authors now were protected both by statutory monopoly *and* natural rights, an abundance of security that Anglo-American authors rarely enjoyed. At this point, however, both protections constituted parallel systems of economic rights—they were alienable and expired at the end of the statutory term.

The mid-nineteenth century also found French courts holding that authors retained property interests even in the *absence* of statutory protection, a trend that culminated in the solidification of a moral rights regime. The first significant step on this evolutionary path came in an 1839 ruling by the Royal Court of Rouen,<sup>219</sup> In that case, strikingly similar to the facts of *Wheaton v. Peters*,<sup>220</sup> the court held that an author's failure to comply with the Copyright Act's deposit requirement precluded him from pursuing a statutory remedy, but "did not negate an author's inherent rights in his work because literary property was a pre-existing and natural right of the author."<sup>221</sup> This was followed by an 1875 judgment<sup>222</sup> in which a French court held that the natural law property right existed in perpetuity.<sup>223</sup> Together, the 1839 and 1875 rulings meant that because an author's literary property rights were fundamental and not mere products of a copyright statute, certain infringement claims were viable for perpetuity irrespective of the statutory term and procedural requirements.<sup>224</sup> As *Wheaton* demonstrated, jurisdictions recognizing only economic copyright, like the United States, would completely bar such claims.<sup>225</sup>

Through the nineteenth and twentieth centuries, French courts continued to expand the scope of noneconomic rights<sup>226</sup> to include (1) the right

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next time. See JOHN P. DAWSON, *THE ORACLES OF THE LAW* 377-79 (1968). Because opinions officially did not have any precedential value, the lower court could choose to ignore the court of appeal's wishes and reissue the original lower court decision. *Id.* Eventually, France somewhat limited these ping-pong matches, and in any case, it often was in the lower court's best interest to "get it right" the second time around. *Id.* at 378-79.

216. Peeler, *supra* note 21, at 438-39.

217. 20 *Journal du Palais* 237.

218. Peeler, *supra* note 21, at 440-41 (discussing CA Seine, Feb. 3, 1875, D. P. 1875, II, 148, 148 nn.2-3).

219. CA Rouen, 1er ch., Dec. 10, 1839, D.P. 1839, II, 74-75.

220. For a discussion of *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), see *infra* Part II.B.

221. Peeler, *supra* note 21, at 446.

222. Chapsal & Noel C. Simon, 24 *Journal du Palais*, 1224.

223. Peeler, *supra* note 21, at 441.

224. See *id.* at 441, 445-46.

225. See *Wheaton*, 33 U.S. at 664-65.

226. When French judges began to base protections on natural rights, French courts, which, to begin with, ruled with a great deal more latitude than might be expected of a

of attribution, which “gives the artist the right to have her name accurately associated with her work”;<sup>227</sup> (2) the right of integrity, which “protects the integrity of the art work itself and, indirectly, the creative process and artist’s reputation. . . prevent[ing] anyone from modifying the art without the artist’s permission. . . even after the artist has transferred ownership in the work and/or copyright to someone else”;<sup>228</sup> (3) the right of disclosure, which means that “[o]nly the artist may determine when she has finished a work and when she will disclose it to others”;<sup>229</sup> and (4) the right of withdrawal, “the flip side to the right of disclosure,” which means that “the artist has the right to withdraw her work if she decides to do so [and] may require the possessor to return the work to her so she can change it or even destroy it.”<sup>230</sup> The broadening of moral rights law necessarily lessened the importance of the public domain’s statutory rights, so that by the time the French Supreme Court ruled that “[i]n a conflict of interest between the public domain on [the] one hand and the authors or their heirs on the other hand, we always lean in favor of the latter,”<sup>231</sup> the decision likely did not raise many eyebrows along the Seine River.

#### IV. “But Hark! Methinks I Hear a Warning Voice,”<sup>232</sup> Or, the Encroachment on American Copyright Law

##### A. Berne and Moral Rights Legislation

The United States’ foray into moral rights was by no means a willing one. Not only did its judges refuse to recognize moral rights claims, but its historic opposition to *droit d’auteur* caused it to refrain from signing onto any international intellectual property treaty that conferred moral rights. That included the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”),<sup>233</sup> enacted in 1886 and amended in 1928 to include article 6bis, which protects an author’s rights of attribution and integrity:

(1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

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civil law court, became even less constrained by statutes. See generally Lasser, *supra* note 171, at 1325 (demonstrating that behind the “official portrait” of the French judge lies a complex dialectic by which the judge frequently departs from and returns to the formalist language of the French legal opinion as a means of organizing and regulating policy considerations).

227. Liemer, *supra* note 19, at 47; see also Joffrain, *supra* note 22, at 768–70 (discussing the right of attribution in French courts).

228. Liemer, *supra* note 19, at 50.

229. *Id.* at 52–53.

230. *Id.* at 54.

231. Cass. crim., May 28, 1875, D.P. 1875, I, 328–29 nn.1–2 (emphasis added).

232. THOMSON, *supra* note 1, at 180.

233. Berne Convention, *supra* note 20.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights. . . .<sup>234</sup>

It was perhaps inevitable that the premier multinational copyright treaty<sup>235</sup> would incorporate moral rights into its framework. According to David Miller, "[t]he British positivist view that copyrights are created by state law suggests that copyrights exist only within state borders."<sup>236</sup> By contrast, the continental perspective that authors' rights originate in nature implied an existence beyond a country's borders.<sup>237</sup> While these distinctions mattered little in the domestically oriented early days of copyright, they grew in significance when cross-border infringement became a commonplace occurrence, necessitating a multinational enforcement mechanism.<sup>238</sup> Napoleonic expansion in the early nineteenth century brought authors' rights to Belgium and Holland, and influenced legal developments in Italy and Switzerland; when the time came to devise an international copyright treaty, the French paradigm naturally predominated.<sup>239</sup>

The United States refrained from agreeing to Berne in part due to its opposition to the treaty's moral rights language,<sup>240</sup> but economic interests eventually prevailed. President Ronald Reagan's pullout from the United Nations Educational, Scientific and Cultural Organization (UNESCO) had diminished the United States' influence over U.C.C. enforcement.<sup>241</sup> Also, pirates were increasingly sapping profits from U.S. cultural exports, and "the world leader in the exportation of copyrighted works. . . thus had a strong interest in doing whatever it could to limit the market of international piracy jeopardizing U.S. copyright holders' creations."<sup>242</sup> Running out of options, the United States had little choice but to become a signatory nation to Berne, and so in 1988 it signed on to the Convention through the Berne Convention Implementation Act.<sup>243</sup> However, the congressional Implementation Act refused to adopt the terms of Article 6bis, and thereby denied authors the right to "claim authorship of the work; or to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation."<sup>244</sup> At the same time, the United States claimed that moral rights statutes were superfluous, because even in the absence of a federal

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234. *Id.*, at art. 6bis.

235. Ginsburg, *A Tale of Two Copyrights*, *supra* note 151, at 1069. Approximately 125 nations are now members of the Berne Convention. Miller, *supra* note 75, at 250.

236. Miller, *supra* note 75, at 249.

237. *Id.*

238. *See id.*

239. *See id.* at 248-49.

240. *See* Antezana, *supra* note 30, at 424, 426.

241. *See* Miller, *supra* note 75, at 244.

242. *Id.*; Antezana, *supra* note 30, at 429.

243. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2(1), (2), 102 Stat. 2853 (1988).

244. *Id.* § 3(b).

statute, existing U.S. law sufficiently protected authors' rights.<sup>245</sup> Given that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Berne Convention's sole enforcement mechanism, did not incorporate article 6bis, the United States' ambivalence toward moral rights did not figure to lead to exposure for liability.<sup>246</sup>

Nevertheless, the United States did purport to comply with its Berne Convention obligations, at least in a minimalist sense,<sup>247</sup> when in 1990 Congress passed the Visual Artists Rights Act ("VARA"),<sup>248</sup> which promised visual artists limited moral rights of attribution and integrity.<sup>249</sup> VARA represents the United States' only attempt to legislate moral rights in accordance with the Berne Convention.<sup>250</sup> Although the scope of the protection is limited—VARA does not extend to literary works, it is only effective during the life of the creator, and some of its protections only cover works of "recognized stature"<sup>251</sup>—some heralded the signing VARA as a "startling breakthrough"<sup>252</sup> and a "significant legislative enactment" that "embraced. . . considerations about the personality of the artists much like those found in the French moral rights."<sup>253</sup> However, American courts have been generally unsympathetic to the moral rights claims of the few plaintiffs who charge them with construing the statute.<sup>254</sup> During its fourteen-year existence, VARA has generated about two published decisions per year, of which plaintiffs have won only a handful.<sup>255</sup> In comparison with the amount of ink that commentators have spilled on its behalf, the meager judicial trickle that VARA has generated speaks far more loudly about its ultimate significance.

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245. Vera Zlatarski, "Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States, 23 COLUM.-VLA J.L. & ARTS 201, 217 (1999).

246. See Agreement Establishing the World Trade Organization, 1994, Annex 1C, MTN/FA/Corr.1, 33 I.L.M. 13 (1994); Joffrain, *supra* note 22, at 751; Tyler T. Ochoa, Amicus Brief: Introduction: Rights of Attribution, Section 43(A) of the Lanham Act, and the Copyright Public Domain, 24 WHITTIER L. REV. 911, 927 (2003) ("The exception was insisted upon by the United States, for the obvious reason that U.S. officials knew that we were not in compliance with Article 6bis and did not want to have our non-compliance officially adjudicated . . . , which would result in international embarrassment and possibly severe trade sanctions as well."). Professor Joffrain also notes that "[a] similar carving-out of moral rights also exists within the North American Free Trade Agreement, exempting the United States from moral right obligations." Joffrain, *supra* note 22, at 751.

247. Antezana, *supra* note 30, at 426.

248. VARA, 17 U.S.C. §§ 106A(a) (1994).

249. *Id.*

250. See Rebecca J. Martel, Note, *The Should-It-Stay or Should-It-Go Spotlight: Protection of Site-Specific Art Under VARA*, 13 DEPAUL-LCA J. ART & ENT. L. & POL'Y 101, 107 (2003).

251. 17 U.S.C. § 106(A)(a)(3)(B) (2000).

252. Frazier, *supra* note 35, at 343.

253. Peeler, *supra* note 21, at 424 n.7.

254. For an amusing, albeit somewhat disturbing account of the first case interpreting VARA, *Carter v. Helmsley-Spear*, 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, rev'd in part*, and vacated in part by 71 F.3d 77 (2d Cir. 1995), see Eric E. Benson, Note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127-29 (1996).

255. Based on a Lexis search conducted by author, October 8, 2004.



Similarly, state experiments at implementing moral rights legislation have resulted in anemic enforcement and apparent judicial apathy. Only three published California decisions adjudicate claims made under the 1979 California Art Preservation Act,<sup>256</sup> which prohibits the "intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art," netting just one plaintiff victory.<sup>257</sup> New York's Artists' Authorship Rights Act,<sup>258</sup> passed in 1984 using substantially similar language to the California statute, has had a similarly dismal track record.<sup>259</sup> State-sponsored moral rights statutes appear destined to join their federal variants in fading into obscurity.

### B. *Dastar* and the Elimination of "Mutant Copyright"

With statutory moral rights moribund in the United States, some proponents have called for judges to rely on so-called "substitute theories,"<sup>260</sup> such as unfair competition, defamation, contractual interpretation, and the right of privacy, to organically expand these common law doctrines to encompass a range of authors' rights.<sup>261</sup> The crux of the argument is that, while such theories are insufficient in their current form to adequately protect moral rights, their value is that "some of them point to a more basic principle," the protection of personality rights.<sup>262</sup> Pared down to their evolutionary core, the argument goes, defamation and its ilk share a common origin with *droit d'auteur*, and therefore judges in "the time-honored tradition of the common law's resort to principle and analogy" would be justified in constructing a common law moral rights regime by reasoning from first premises and logically extending these doctrines to their natural

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256. California Civ. Code 987(c)(1) (1979); 987(c)(2) prohibits grossly negligent conduct of the same sort.

257. Based on a Lexis search conducted by author, October 8, 2004. The sole plaintiff victory (pending retrial) was *Botello v. Shell Oil Co.*, 229 Cal.App.3d 1130 (1991), where defendant gas station destroyed a wall, on which plaintiffs had defendant's permission to paint a mural, without notifying plaintiffs beforehand. The court held that "the mural was within the protection of the Act." *Id.* at 1136. Arguably, the extreme insensitivity with which the corporate defendant treated plaintiffs' work renders this case an outlier.

258. N.Y. Art & Cult. Aff. § 14.03 (1) (1984).

259. Based on a Lexis search conducted by author, October 8, 2004. The two New York cases that did not result in a full and outright verdict for the defendant (out of a total of five) were *Schatt v. Curtis Management Group, Inc.*, 764 F. Supp. 902 (S.D.N.Y. 1991), and *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990) (holding that "defendants' motion for partial summary judgment was granted in part and denied in part").

260. The term "substitute theory" is borrowed from Note, Eric M. Brooks, "Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 Calif. L. Rev. 1431, 1439-72 (1989) (discussing the inherent inadequacies of employing preexisting common law causes of action to protect moral rights).

261. See generally Damich, *supra* note 170, at 35-75 (surveying current U.S. common law moral rights protection, and concluding that "[a]lthough American law occupies some of the same ground as *droit moral*, considerable expansion of American law would be necessary for it to be coextensive with *droit moral*.").

262. *Id.* at 95.

conclusions.<sup>263</sup>

However, the Supreme Court's recent decision in *Dastar Corp. v. Twentieth Century Fox Corp.*<sup>264</sup> demonstrates that circuitous routes to moral rights claims also are incompatible with the United States' statute-based economic copyright regime. Without ever invoking the phrase "moral rights," the Supreme Court's unanimous decision in *Dastar* stunted the ability of claimants to construe noncopyright laws to bring moral rights claims. In short, the controversy centered around a twenty-six episode television series, first broadcast in 1949, and based on General Dwight D. Eisenhower's book entitled *Crusade in Europe*, which recounted his World War II experiences.<sup>265</sup> Twentieth Century Fox ("Fox") originally owned the rights to the television version of *Crusade*, but failed to renew the copyright, so that in 1977, following the twenty-eight year statutory copyright period, the work entered the public domain, pursuant to the Copyright Act of 1909.<sup>266</sup> In 1988, Fox reacquired "the exclusive right to distribute the *Crusade* television series on video and sub-license others to do so."<sup>267</sup> In 1995, Dastar purchased eight tapes of the 1949 version of *Crusade*, copied them, removed any indication that they had been previously broadcast or even that they were based on Eisenhower's book, spliced in its own name and credits, and sold the videos as its own.<sup>268</sup>

Fox responded by suing Dastar under section 43(a) of the Lanham Act, which governs U.S. trademark law.<sup>269</sup> Section 43(a) prohibits "us[ing]

263. *Id.*

264. *Dastar Corp. v. Twentieth Century Fox Corp.*, 539 U.S. 23 (2003).

265. *Id.* at 25-26.

266. See *id.* at 25-26. The Copyright Act of 1909 prescribed a twenty-eight year copyright term from the date first publication, with the option of renewal for an additional twenty-eight years. See An Act to Amend and Consolidate the Acts Respecting Copyright, § 23, reprinted in 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at T137, T146 (E. Fulton Brylawski & Abe Goldman eds., 1976).

267. *Dastar*, 539 U.S. at 26.

268. *Id.*

269. 15 U.S.C. § 1125(a) (2004). This Act provides the following:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—  
(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this Act for trade dress not registered on the principal register, the person who asserts trade dress pro-

in commerce any. . . false designation of origin. . . which is likely to cause confusion, or to cause mistake, or to deceive.”<sup>270</sup> Section 43(a) provides a statutory hook for an aggrieved party to raise a variety of false representation claims in federal court, including “reverse passing off,” which occurs when the public is led to believe that one party produced a good that in fact a second party produced.<sup>271</sup> For example, if Coca-Cola fills bottles of Coke with Pepsi formula, thereby leading consumers to mistakenly believe they are drinking Coke, Pepsi would have a viable reverse passing off claim.<sup>272</sup>

Ostensibly, section 43(a) is the trademark equivalent of the moral right of attribution (or “paternity”), an artist’s inherent right to have her work identified as her own to the public.<sup>273</sup> In a moral rights regime, for instance, a master painter might bring a misattribution claim against a second-rate artist who sells reproductions of the master’s works as his own, and the judge could require that the defendant print the word “copy” on all reproductions to avoid potential customer confusion.<sup>274</sup> The facial similarity between the two causes of action, especially given that courts have exhibited great flexibility in applying section 43(a) to various deceptive practices,<sup>275</sup> was one reason that the United States Congress declined to explicitly recognize moral rights in the Berne Implementation Act, instead arguing that “[t]here is a composite of laws in this country that provides the kind of protection envisioned by Article 6bis.”<sup>276</sup> The United States specifically cited section 43(a) to convince skeptical nations that “authors’ moral rights were protected by the United States under legal schemes other than copyright.”<sup>277</sup> Arguably, then, a ruling in favor of *Dastar* would effectively foreclose a federal common law right of attribution, and “might be used by other countries to bring the United States’ persistent noncompli-

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tection has the burden of proving that the matter sought to be protected is not functional.

*Id.*

270. *Id.*

271. John T. Cross, *Giving Credit Where Credit Is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 WASH. L. REV. 709, 737 (1997). “Reverse passing off” is the conceptual inverse of its precursor, “passing off,” also prohibited under section 43(a), which occurs when a party “sells its own goods using someone else’s name or mark.” *Id.* at 710 n.9. While passing off fits more neatly within section 43(a)’s prohibition against “false designation of origin,” 15 U.S.C. 1125(a)(1) (2004), courts have interpreted the statute as reaching “all deceptive practices that are economically equivalent to passing off,” in which category they include reverse passing off. Cross, *supra*, at 737 (internal quotations omitted) (citing *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981)).

272. *Dastar*, 539 U.S. at 32. By contrast, passing off would prohibit Coca-Cola from deceiving customers by slapping Pepsi labels on bottles filled with Coke. *Id.*

273. See generally Joffrain, *supra* note 22, at 768-70 (discussing the moral right of attribution).

274. *Id.* at 770.

275. Cross, *supra* note 271, at 732.

276. Suhl, *supra* note 20, at 1212-13 & n.76 (quoting H.R. Rep. No. 609, 100th Cong., 2d Sess. 32-34 (1988)).

277. Janet Fries & Michael J. Remington, *Who Remembers the Names? Authors’ Rights in Flux After Dastar Ruling*, LEGAL TIMES, July 21, 2003, IP Insert, at 30.

ance with Article 6bis to the forefront of the international copyright agenda."<sup>278</sup>

When the Ninth Circuit affirmed the district court ruling in favor of Fox's reverse passing off claim, faulting Dastar for "substantially copying" the *Crusade* series and marketing it "without attribution to Fox,"<sup>279</sup> it appeared that section 43(a) could indeed become a haven for quasi-moral rights claims on the borderland of copyright and trademark.<sup>280</sup> Neither court explicitly mentioned "moral rights"; nevertheless, Dastar's Petitioner's Brief to the Supreme Court invoked the term on several occasions, accusing Fox (and by extension the judges that found Dastar liable) of attempting to construe the Lanham Act as a moral rights statute.<sup>281</sup> Fox, on the other hand, vigorously denied that its claim was based on anything other than straightforward trademark law.<sup>282</sup> Fox disavowed any support for a "freestanding perpetual moral right" and emphasized its support for the "statutory, constitutional, and even moral right to copy and disseminate products in the public domain."<sup>283</sup> But, Fox insisted, *Dastar* was not a copyright case; rather, it arose under classic trademark law, where the concept of a public domain is nonexistent.<sup>284</sup>

However, Fox underestimated the Supreme Court's aversion to recasting a copyright dispute as a trademark matter. Writing for the Court, Justice Scalia clearly felt that a moral rights tempest was brewing within a trademark teapot, one with implications for the public domain: "The right to copy once a copyright has expired, and to copy without attribution. . . passes to the public. . . . [O]nce the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution."<sup>285</sup> Justice Scalia feared that finding for Fox would "create a species of mutant copyright law that limits the public's federal right to copy

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278. Ochoa, *supra* note 246, at 927.

279. *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 34 Fed. Appx. 312, 314 (9th Cir. 2002) (emphasis added).

280. The district court found defendants liable both for copyright infringement, having "violated the copyright of Gen. Eisenhower's book," and for trademark violations, "by boldly appropriating the *Crusade* Series and falsely identifying themselves as producers of *Campaigns* . . ." *Twentieth Century Fox Film Corp. v. Dastar Corp.*, 2000 U.S. Dist. LEXIS 22064, \*1-\*2, Case No. 98-7189 FMC (Ex) (C.D. Cal.).

281. Brief for Petitioner, *Dastar*, 539 U.S. 23 (No. 02-428). For example, Dastar asserted that protecting the right of attribution for originators of works constituted a moral rights claim "in direct conflict with the great caution Congress ha[d] shown as it ha[d] added such rights to the Copyright Act." *Id.* at 7. Dastar reminded the Court that "Congress ha[d] consistently refused to follow the path of those countries—mainly in continental Europe—that offer authors and artists a broad, inalienable 'moral right' to be identified whenever their works are displayed or published." *Id.* at 30.

282. Brief for Respondents, *Dastar*, 539 U.S. 23 (No. 02-428).

283. *Id.* at 9.

284. See *id.* at 10 ("The issue here is not whether Dastar was entitled to copy Fox's creative work, but whether Dastar was entitled to copy Fox's work and then intentionally misrepresent to consumers that the product was an original work created entirely by Dastar.").

285. *Id.* (emphasis added).

and to use, expired copyrights.”<sup>286</sup> This would result in the rebirth of a “species of perpetual patent and copyright, which Congress may not do.”<sup>287</sup>

In essence, the Court must have been conscious that any holding in favor of Fox—even if narrowly tailored to trademark law—would turn the clock back to *Millar v. Taylor*<sup>288</sup> and encourage future pseudo-moral rights litigation under the guise of the Lanham Act. The following exchange involving “bodily appropriation,” between the Court and Fox’s counsel during Oral argument, proves the point:

QUESTION: [The Ninth Circuit] has taken a rather extreme view of what the Lanham Act protects. . . . [I]t’s a means, it seems to me, of expanding copyright protection.

MS. CENDALI: Your Honor, [I] really don’t think so because, again, [Dastar] could have copied. The problem isn’t with the copying. The problem was the taking credit for themselves. Going back to. . . [District Court] Judge Cooper’s description of her own summary judgment decision, she says, by bodily appropriating the Crusade series and falsely identifying themselves as producers of Campaigns—

QUESTION: How does the phrase, bodily appropriation, fit into the Lanham Act?

MS. CENDALI: I think it’s designed as a—as a tool in reverse passing off cases where you’re dealing with products to help assess how similar those—those products are[.]

QUESTION: Certainly there’s nothing like that in the Lanham Act itself.<sup>289</sup>

The “bodily appropriation” test incorporates many of the standards from copyright jurisprudence.<sup>290</sup> Under copyright law, a defendant who copies a plaintiff’s work without “significant variations” has unlawfully appropriated that work.<sup>291</sup> Some courts have extended that reasoning to trademark law, finding defendants liable for bodily appropriation when “consumers of the copy would confuse it for the original.”<sup>292</sup> Thus, by holding that Dastar had committed a bodily appropriation when it “copied substantially the entire Crusade in Europe series[.], . . . labeled the resulting product with a different name and marketed it without attribution to Fox,” the Ninth Circuit had in effect applied a copyright test to a trademark case involving an expired copyright.<sup>293</sup> The Supreme Court rightly recognized that the entrenchment of this doctrine would encourage future creators to bring reverse passing off trademark suits with the intended effect of

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286. *Id.* (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989) (internal quotation marks omitted)).

287. *Dastar Corp. v. Twentieth Century Fox Corp.*, 539 U.S. 23, 37 (2003).

288. *Millar v. Taylor*, 98 Eng. Rep. 201, 209 (1769). For a discussion of *Millar*, see *supra* Part I(C)(2).

289. Oral Argument at 33, *Dastar*, 539 U.S. 23 (No. 02-428).

290. Cross, *supra* note 271, at 725.

291. *Id.* at 725 n.71 (citing *Cleary v. News Corp.*, 30 F.3d 1255, 1261 (9th Cir. 1994)).

292. *Id.*

293. *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 34 Fed. Appx. 312, 314 (2002).

restricting unauthorized reproductions of works that no longer benefit from statutory protection.

Nevertheless, considering that “every Circuit to consider the issue found § 43(a) broad enough to encompass reverse passing off,” the Court was reluctant to entirely cripple the doctrine.<sup>294</sup> Instead, Justice Scalia found a hook in the word “origin,”<sup>295</sup> which he used to forge a substantive distinction between bodily appropriation in the copyright context and its trademark double.<sup>296</sup> According to Justice Scalia, unlike copyright law, the common-law foundations of the Lanham Act “were *not* designed to protect originality or creativity,” and for that reason Congress intended “origin” to refer only to “the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.”<sup>297</sup>

Driving a wedge between the creative origins of a work and the raw materials on which it is proliferated, and assigning copyright to protect the former and trademark the latter, the Court hoped to prevent the Lanham Act from “creating a cause of action for, in effect, plagiarism.”<sup>298</sup> Using that logic, the Court found that, at worst, Dastar’s actions constituted *nonattribution* (i.e., not identifying Fox as the original creator of *Crusades*), which is permissible under copyright for public domain works, rather than *misattribution* (i.e., falsely taking credit for producing *Crusades*), which violates the Lanham Act’s prohibition on misrepresentation.<sup>299</sup> The distinction is critical: While misattribution falls squarely within the ambit of trademark protection, nonattribution is purely a copyright issue.<sup>300</sup> In moral rights regimes, the original creator can prevent *both* nonattribution and misattribution, whether or not the work is in the public domain, by invoking her moral rights.<sup>301</sup> In the United States, however, the public interest trumps that of the author, and the original creator is powerless to prevent even whole-scale pilfering of works no longer protected by the statutory copyright monopoly.<sup>302</sup> Thus, had the Court upheld the Ninth Circuit’s ruling in favor of Fox, it effectively would have allowed Fox to enforce the moral right of attribution by invoking trademark law, circumventing the limit on authors’ statutory monopoly. Without mentioning the words “moral rights,” the Court foreclosed future claims that, in substance, would mimic the moral right of attribution, even if ostensibly brought as noncopyright claims.

Clearly, the Justices were not disposed to stretch the Lanham Act to protect works that had entered the public domain. But the crux of the

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294. *Dastar Corp. v. Twentieth Century Fox Corp.*, 539 U.S. 23, 30 (2003).

295. Liability under § 43(a) requires that the plaintiff demonstrate “confusion . . . as to the origin . . . of his or her goods.” 15 U.S.C. 1125(a)(1)(A) (2004).

296. *Dastar*, 539 U.S. at 31–32.

297. *Id.* at 37.

298. *Id.* at 36.

299. *See id.* at 31–38.

300. *See id.*

301. *See Joffrain, supra* note 22, at 768–70.

302. *Dastar Corp. v. Twentieth Century Fox Corp.*, 539 U.S. 23, 31–38 (2003).

problem is not simply that the Lanham Act is ill-suited to provide cover for authors whose works risk being copied without attribution. Rather, no existing body of law could offer such coverage without replacing what Professor Dallan describes as the "utilitarian, or public benefit, rationale of copyright law," with natural law copyright.<sup>303</sup> Since the passage of the Statute of Anne in 1710, Anglo-American history has involved the systematic displacement of natural law copyright, wherein "the author has an inherent ownership right in the work,"<sup>304</sup> in favor of statutory copyright, wherein the author's incentive to create "is balanced against the public's need for access to the work."<sup>305</sup> Conversely, moral rights embrace rather than repudiate natural law, and require acquiescence to the principles of a brand of natural law—that protecting personality rights—with no basis in the historical foundations of Anglo-American copyright, premised on the "belief that the subjectivity of creators deserves unquestioning protection" wholly apart from their economic interests.<sup>306</sup> Not only would the expansion of moral rights necessarily entail the reabsorption of natural law into U.S. copyright, it would force American courts to apply *French*, as opposed to American, natural law theories in shaping their decisions. That such an occurrence is inimical to the functioning of the common law is axiomatic: common law develops from "norms and patterns of behavior [that exist] in the minds of the people, in the consciousness of the community."<sup>307</sup> In *Dastar*, the Court reaffirmed that the U.S. copyright regime is one in which "[t]he rights of a patentee or copyright holder are part of a 'carefully crafted bargain,'"<sup>308</sup> and part of the bargain vests the public with "[t]he right to copy, and to copy without attribution, once a copyright has expired."<sup>309</sup> While *Dastar* demonstrates that the United States is unlikely to fulfill its responsibilities under the Berne Convention, sweeping aside the foundational principles of U.S. copyright is far too great a price to pay for such an indulgence.

## Conclusion

In *Wheaton's* wake, U.S. courts have only entertained copyright claims arising from federal acts and the Constitution, and have ruled that any expansion of copyright protection necessarily must come from Congress-

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303. Dallan, *supra* note 3, at 367.

304. *Id.* at 368.

305. *Id.* at 367.

306. Zlatarski, *supra* note 245, at 203. Zlatarski argues that French moral rights regime has fostered a system where, "[b]y jealously guarding artists' moral rights at the expense of the interests of others, the law encourages arrogance and insensitivity on the part of artists." *Id.* at 208.

307. HAROLD J. BERMAN, LAW AND REVOLUTION 481 (1983).

308. *Dastar*, 539 U.S. at 33 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51, 103 L. Ed. 2d 118, 109 S. Ct. 971 (1989)).

309. *Id.* (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230, 11 L. Ed. 2d 661, 84 S. Ct. 784, 1964 Dec. Comm'r Pat. 425 (1964)).

sional action rather than judicial activism.<sup>310</sup> On numerous occasions, the Supreme Court has held that the Copyright Clause's foremost aim is not to reward authors but to employ the "limited grant [as] a means by which an important public purpose may be achieved."<sup>311</sup> Though a number of commentators have argued that the Court has been overly deferential to Congress's arbitrary lengthening of the copyright term,<sup>312</sup> the Court clearly respects Congress's mandate to balance the public and private interests as it sees fit.

Congress has also repeatedly treated copyright as strictly a creature of positive law.<sup>313</sup> Perhaps the quintessential expression of the pro-public domain, anti-natural rights sentiment came in the form of the 1909 Copyright Act, which, in extending the author's monopoly to two twenty-eight year terms, clarified that "the object of all legislation must be. . . to promote science and the useful arts[.]. . . not primarily for the benefit of the author. . . ."<sup>314</sup> Turning to natural rights, Congress was adamant that "[t]he enactment of copyright legislation by Congress under the term of the Constitution is *not based upon any natural right* that the author has in his writing."<sup>315</sup> The Copyright Act of 1976 then eliminated the final vestige of common law copyright—the perpetual copyright for unpublished works—by pegging the running of the statute to the moment of a work's *creation*, rather than its *publication*.<sup>316</sup> Professor Patterson notes that these policy preferences, which have echoed throughout U.S. history, are necessary to retain the Founders' calibration of competing interests: "If copyright is an example of natural law property, the rights will be weighted in favor of the copyright holder; if copyright is a marketing monopoly, the rights will be

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310. See Garon, *supra* note 26, at 1310 (noting that "[t]he Supreme Court has repeatedly recognized the power of Congress to adjust the balance of rights between authors, publishers, and the public").

311. Dallan, *supra* note 3, at 431 (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). Among the cases that reaffirmed American copyright's statutory derivation are *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 349-50 (1991); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524, 526 (1994); *N.Y. Times v. Tasini*, 533 U.S. 483, 496 n.3 (2001); and *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Dallan, *supra* note 3, at 430 n.414.

312. See, e.g., Ginsburg, et al., *How Long Is Too Long?*, *supra* note 30, at 667 ("[T]he sheer randomness of any congressional copyright term extension is such [that] it cannot constitute a meaningful present incentive."); Ammori, *supra* note 146, at 291 ("The public domain of the future cannot be protected without constraints on prospective copyright duration.").

313. Strowel, *supra* note 16, at 244.

314. Ammori, *supra* note 146, at 313 (quoting H.R. Rep. No. 60-2222 (1909)).

315. Strowel, *supra* note 16, at 244-245 (quoting MELVILLE B. NIMMER & DAVID NIMMER, 8 NIMMER ON COPYRIGHT, iv., app. 13-9) (1992) (emphasis added).

316. Compare 17 U.S.C. 303(a) (1976) (before being amended by the Sonny Bono Copyright Term Extension Act) ("Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978 . . ."), quoted in Ginsburg, et al., *How Long Is Too Long?*, *supra* note 30, at 687 n.67, with Act of March 4, 1909, ch. 320, 2, 35 Stat. 1075, 1090 (1909) ("[N]othing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."), quoted in Ginsburg, et al., *How Long Is Too Long?*, *supra* note 30, at 687 n.68.



more evenly balanced among author, publisher, and user.”<sup>317</sup>

The contrast between the American and French approach to copyright law could not be more pronounced. Congress, constitutionally assigned with the task of balancing the interests of copyright holders and the public, had legislated common law copyright out of existence. Meanwhile, with the Law of March 11, 1957, France’s copyright regime squarely gave effect to an interpretation of natural law rooted in the unalienable personality rights of authors, unabridged by positive law, ensuring the doctrine’s permanence in French society.<sup>318</sup> The basic premise of a moral rights regime is that personality rights are inalienable, and trump the rights of the public domain.<sup>319</sup>

Because these two definitions of “natural rights”—one based on personality and the other on property—clash in a fundamental way, legislatively transplanting French “natural rights” onto American soil is inherently paradoxical. French moral rights developed incrementally over half a millennium (or, if one takes the French Revolution as a starting point, over two hundred years), as semi-coherent arguments made in medieval courts have over time crystallized into concrete, refined doctrines that were finally legitimized by statutory enactments. How could any U.S. statute embody the nuances and conform to the precise dimensions of these rights, which are after all projections of the cumulative values of French society, and reflections of myriad judicial decisions that collectively encompass the doctrine of *droit d’auteur*? On U.S. soil, this framework is absent; moral rights statutes would signify nothing more than the naked words that comprise them.

While in a vacuum it might be feasible to fill out such statutes with layers of common law interpretation, judges simply cannot be expected to construe authors’ rights legislation in a manner consistent with the Constitution, copyright acts, and judicial precedent, and still give effect to the rights set forth by the statutes. Thrown into the midst of copyright’s constitutional bramble-bush,<sup>320</sup> moral rights is not easily reconciled with more established common law doctrines. Even the Visual Artists Rights Act, passed nearly fifteen years ago, has generated little more than a ripple. Undoubtedly, any future statutes would meet the same lukewarm response. In the final analysis, the United States’ rejection of natural law

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317. L. Ray Patterson, *Nimmer’s Copyright in the Dead Sea Scrolls*, *supra* note 165, at 434.

318. See Damich, *supra* note 170, at 6–7. The doctrine’s “first legal adoption in French law was not official until 1992,” although “the French legislature officially recognized them individually, although not by that title, in a 1957 legislative amendment.” Peeler, *supra* note 21, at 426.

319. See Garon, *supra* note 26, at 1301 (“[a]nointing the author’s relationship with his work as essential and unrestricted stands in diametric opposition to the open marketplace of ideas idealized in the United States.”).

320. See generally Matt Jackson, *Harmony or Discord? The Pressure Toward Conformity in International Copyright*, 43 IDEA 607, 625 (2003) (surveying various constitutional issues presented by the incorporation of moral rights in the United States, including the “utilitarian premise on which U.S. copyright law is based and constitutionally grounded” and the First Amendment’s protections of fair use).

literary property rights and its constitutional mandate to promote "Science and the useful Arts" for the public good leave no cracks in the pavement through which *droit d'auteur* could take root, much less flourish.

*Dastar* highlights the infeasibility of introducing moral rights in the United States through either common law or statute. Even accepting *arguendo* that American courts and legislatures could feasibly (and constitutionally) return to the *Millar* world, where the common law granted rights unhindered by statutory copyright laws, Anglo-American natural property rights are inextricably linked to conceptions of physical ownership. Accordingly, only the actual owner of an object can assert claims flowing from violations of his ownership rights, while moral rights assume that the literary property can be divided between the owner (the purchaser of a text) and the creator of a work.

Anglo-American common law has never recognized a natural right connected to mere creation in the absence of ownership. It may be argued that while "the author was a comparative latecomer into the development of copyright in England, rather than being its starting-point as was the case in France,"<sup>321</sup> a late start should not inhibit Anglo-American authors from enjoying the same abundant legal protections as their European brethren. However, this approach wrongly assumes that the balance of power between the author and the public domain would remain constant irrespective of the adoption of moral rights. In the absence of evidence to suggest that the paucity of moral rights has hampered creative output in the United States, and that this has diminished the overall quality of the works available to the public and consequently weakened the public domain, it is all but certain that moral rights will have a deleterious effect on all but the creator. Though moral rights may be functional in France and other countries that have adopted them, in the attempt to transfer them to the United States, a great deal is lost in the translation.

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321. FEATHER, *supra* note 49, at 3-4.

